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5-5-04
Cape of Good Hope. Supreme Court. 6-25

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1896

(WITH TABLE OF CASES AND DIGEST).

ADVOCATE LOUIS O. MILLER
EX LIBRIS
JOHANNESBURG

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, ADVOCATE OF THE SUPREME COURT, AND ASSISTANT LAW ADVISER TO THE CROWN.

VOL. VI.

CAPE TOWN:

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S STREET.

1897.

JUDGES OF THE SUPREME COURT DURING THE YEAR 1896.

THE RIGHT HONOURABLE SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice).
HON. MR. JUSTICE BUCHANAN (Acting Chief Justice from 1st Aug. to 6th Sept.).
HON. MR. JUSTICE MAASDORP.
HON. MR. JUSTICE SOLOMON (Sat during the August Term).

Attorneys-General.

HON. W. P. SCHREINER, Q.C., C.M.G.
HON SIR THOMAS UPINGTON, Q.C., K.C.M.G.

*TABLE OF CASES.

ERRATA.

At page 176, in the 3rd line from bottom of right-hand column, read *Titterton* for T. Merton.

At page 177, Mr. Schreiner, Q.C., should have been mentioned as counsel for the defendant, and Mr. Innes, Q.C., for the plaintiff.

At page 242, in the 22nd line of right-hand column omit *certain* before and read *were* after alterations, and in the last line of the judgment read *will* for would.

At page 262, in the 2nd line of the judgment in Regina v. Otto, read *1883* for 1873.

At page 262, in the 5th line of Hanekom v. Haworth, read *with costs* for without costs.

At page 284, in the 2nd line of Mr. Schreiner's argument, read *can* for to.

At page 293, in the 33rd line of left-hand column, after the word tall read *I was*.

At page 296, in last line of left-hand column, omit the word *the*.

At page 298, in the 20th line from bottom of left-hand column, read *note* for rule.

At page 311, in the 3rd last line of the judgment, read *declaration* for petition.

At page 323, in 1st line of Stevenson v. Stevenson, read *action* for application.

At page 327, the detailed account as printed is wrong, the total of £4 18s. being made up of the two items £2 6s. 6d. and £2 11s. 6d., referred to in the earlier part of the report of the case.

At page 348, in the last line of the head-note in the Petition of the Trustees of the Diocese of Cape Town, read *purchasers* for purchasing.

At page 359, omit the word *that* in the 15th line of the judgment, and read *give* after to in the 26th line.

---

* Nearly all the cases which appear in Parts II., III., and IV. of this Volume were reported by Mr. Close of the Supreme Court Bar, for whose valuable assistance I desire to express my indebtedness.—J.D.S.

	PAGE
Aberdeen Divisional Council v. Maré	392
Abraham, Bernard, Estate of	201
Abrahamse, A. J., Estate late	294
Adonis v. Du Toit	187
Aitchison v. Aitchison	122, 339
Albertyn, E., Insolvent Estate of	389
Aling, Estate of	108
Aliwal Board of Executors v. Boss	293
Allenzenski v. Allenzenski	307
Anderson & Co. v. Falconer	2
Arderne, D. A., *ex parte*	200
Arderne & Co. v. Moss	429, 476
Arderne v. Ohlsson	334
Arnholz, B., *in re*	240
Arnholz & Co. v. Smeer	13
Atmore v. Chaddock	181
Attorney-General v Kirstein	51
Auret v. Albertyn	330
Baart v. Baart	14
Badenhorst v. Smit	50
Ball's Estate, *re*	50
Bam v. Nel	91
Bam, J. G., Estate late	347
Barber, Laura G. (Minor), *in re*	368
Barnard v. Barnard	129
Barnes, G. A., *ex parte*	107
Barrington's Executors v. Colonial Government	505
Bartens, E. C. K. and Wife, Petition	494
Bartlett, R. H., *ex parte*	382, 403, 456
Baxter, F. W.	382
Beattie v. Conradie	21
Beddy, *ex parte*	276
Beedle & Co. (in liquidation)	51, 98
Behr v. Munro and Another	381
Bell's Estate, *re*	3
Bell v. Horsfall	106
Bell (Minors)	246
Benjamin, A.	382
Berg (Minors), *re*	57
Berhardien Kamardien, *ex parte*	107
Berhardien v. Intillah	34, 41
Bester, *re*	86
Beyers, J. L., *in re*	273
Beyuidenhout v. Kok's Executor	361
Blacking and Izdebski v. Gasson	35
Blayney v. Le Grange	429
Board v. Titterton	176
Boll, *ex parte*	32
Boncker (Minors), Matter	387
Bonnar v. Bonnar	99, 193, 346
Boothby v. Cutler	32
Bosch (Minors), *re*	393
Botha (Minors), *ex parte*	274
Botha v. Henning	335
Bourhill's Executors v. Ark of Safety Lodge, Caledon	1
Bourhill (Minor), *in re*	202
Bower v. Colonial Government	163
Boyd (Minor), *in re*	122
Brand, *ex parte*	105
Brest and Ladou v. Heydenrych	54
Brink, J. S. F.	384
Brink v. Calitz	381
Brinkman, *ex parte*	32
Burdack v. Burdack	413
Burdack, Pauline B., Petition	367
Burger, B. J., *ex parte*	148
Bulpin v. Jackson	263
Butler, R. C., *in re*	340
Cairncross (Minor), *in re*	375
Campbell, Q., *in re*	256
Cape Town, Trustees Diocese of, Petition	348
Cape Transvaal Gold Mining Association (in liquidation)	51, 101
Christian, *ex parte*	51
Cilliers' Trustee v. Cilliers	57, 91
Clan Line Steamers v. Alcock	130
Clark, Eliz. L. C., Petition	151
Clark v. Cape Town Town Council	365
Clarke v. St. Leger and Others	141
Classen and Lange (Minors), *in re*	377
Cleenwerck v. Cleenwerck	466
Cleenwerck, J. G., Petition	393
Cloete, G. S., *ex parte*	429
Coetzee, R. P., Estate late	256
Cole v. Riley	219
Colonial Government v. Coetzee	235
" " v. Crickmore	383, 465
" " v. J. J. Kotze	255
" " v. Jan L. Kotze	255
" " v. Madumashe	122, 224
" " v. McCay	11
" " v. National Bank, S.A.R.	427
Colonial Government v. Noltzykop Gold Mining Company	466
Colonial Government v. Opperman	15

	PAGE
Colonial Government v. C. Opperman	121
„ „ v. Railton	224
„ „ v. Taylor and Simons	15
Colonial Government v. Tobiya	201, 255
„ Orphan Chamber v. Blom	106
Connell v. Factor and Lax	53, 100
Conroy v. Bezuidenhout	326
Cosmer v. Wesner	440
Court v. Mosenthal & Co.	154
Cowling (Minors), *in re*	387
Cox, S., Estate of	233
Cradock Building Society, Petition	125
Croeser v. Croeser	63, 123
Croker v. Croker	20
Cross's Executors v. Cross and Others	349
Curlewis v. De Beer	367
Cuthbert, J. K., *ex parte*	224
„ „ *in re*	382
Darroll v. Thompson and Another	241
Davies, Elizabeth, A., Late Estate	496
Dawson, D. S., Estate of	116
Dawson's Estate, *re*	33, 101
Day, James, and Borsley, Mary A., Ante-nuptial Contract	149
Day v. Day	79
Dearham v. Dearham	15
De Jongh, *ex parte*	85
De Villiers, Elizabeth M. C., Estate Late	406
„ v. Fick	84
„ Izaak A. J. and surviving widow, Estate of	324
De Waal, J. A. S.	382
De Klerck v. Winterbach	190
„ v. Zeeman	192
De Kock v. Resident Magistrate of Caledon	417
De Pass & Co. v. Louw	148
De Wet, C. J. M., *in re*	256
De Wet, *ex parte*	105
Dickson v. Broadbent	456
Dieterle v. Sturk	368
Diocese of Cape Town, Trustees' Petition of	348, 393
Diocese, Cape Town, Trustees v. Kruger's Executors	224
Dipenaar, A. P.	382
Distin v. Lamont and Trick	487
Divisional Council, Aberdeen, v. Maré and Another	393
Divisional Council, Aberdeen, v. Truter	498
Dodd v. Power and Another	381
Dreyer v. Botha	120
Drouet v. Clark	12
Du Plessis, P. J. A., *ex parte*	494
„ Maria, Estate of	247
„ N. van W., *ex parte*	392
Du Preez v. Neethling	84
During's Estate, *re*	86
Du Toit v. Beukes	399
„ v. Van der Spuy	63
Dutch Reformed Church of Cape Town, Petition of Consistory of	495, 504
Dutch Reformed Church, Dordrecht, Petition of Consistory of	416
Dutch Reformed Church, Dordrecht, and Johannes C. Theron, Petition	465
D.R. Church v. Snyman	57
D.R. Church, Wynberg, *ex parte*	7
Eagle, F. C. W., Petition	240
East London Mutual Hall Co., *in re*	108
Eckhardt and Another v. McCallum	381
Eggersgluss, H. F. C., Estate	256
Elliot, P. W., *ex parte*	416
Engelbrecht, C. P., *in re*	293
Equitable Fire Insurance Co. v. Coetzee	224
Erasmus v McCallum	255
Evan & Co., *in re*	324
Eyth v. Eyth	33, 91
Fairbridge & Co. v. Baart	456
„ v. De Villiers	367
Fakeer, Estate late	233
Faktor v. De Wet	324
„ M., Petition	274
Farre v. Charlton	13
February v. Brandon, Kirby & Co.	98, 443
Fischer's Estate, *re*	52
Fitchet (Minors)	116
Flather, *ex parte*	495
Fletcher v. McDonald Bros.	98
Fletcher's Wholesale v. Mahomed	381
Forbes v. Behr	341
Fourie, J. W., *in re*	256
Frost, J., Estate	257
„ and Southey, *ex parte*	10
Fry v. Fry	346, 375, 413

	PAGE
Fulss v. Molentze	402
Furnivall v. Furnivall	15
Gabb & Fraser v. Greenshields ...	488
Gabinge v. Gabinge	248
Gadiega v. Ebriem	146
Gamaat, Johaar (Minor), Estate of ...	141
Gavin v. Gavin's *Curator Bonis* ...	240
Geldenhuys v. Kuilder	394
George's Executors v. Lucke	239
Gibson v. Frost	178
„ v. Knight	187
Gildenhuys, Cornelia M., Petition ...	376
Gillet v. Kieser	85
„ v. Nowitz	85
Glaeser's Executors v. Quin's Executors	9
Glass v. Grahamstown Brickmaking Co.	174
Glover v. Glover	215
Goedhals, P. R., *ex parte*	494
Gordon v. Berliner	325
„ & Gotch v. McNally and Another	381
Gordon & Gotch v. Simon	256
Gotthelf v. Gotthelf	335
Gower v. Gower	329
Grobbelaar v. Gous	417, 499
Habig v. Habig	190, 240
Hadje Salie v. Sahiebo	58
Hagan, W. T. J.	382
Halse, Henry J. and Anne L., Estate of	141
Hand & Co., Liquidators of, v. Van Zyl	57
Hanekom v. Haworth	262
Hansen & Schrader v. Pickard	32
Hargreaves, *ex parte*	98
Harsant, J. G., *ex parte*	494
Harte v. Frame	312
Hasler v. Hasler	413
Haupt v. Haupt	249
Haupt, P. F., *in re*	340
Haworth v. Haworth	456
Haworth v. Resident Magistrate, Kenhardt	378
Hayward, *ex parte*	21
Headley Bros. v. Power	224
Headley Brothers v. J. Power & Co. ...	315
Hearn, A. W., and Another, Petition ...	148
Heathcote, J. W., *in re*	240
Heinemann v. Barnes	106
Helm v. Helm	439
Henkes, Estate, *re*	99
Hennings v. Grobler	218
Henry & Co. v. Clark & Co.	72
Hertzog v. Webster	493
Hewetson & Co. v. Solms ...	224, 239
„ Jeffrey & Co. v. Solms ...	239
Heydenrych v. Behr	210
„ and Crole, *ex parte* ...	34
„ v. Fourie	400
„ v. Lynch	50
Hill v. Colonial Government	250
Hirsch v. Solomon	98
Hitzeroth's Executors v. Pedersen ...	168
Hitzeroth, Maria, Estate	383
Hodgson v. Thomas	57, 68
Hoets' Estate, *re*	90
Hoets, J. M., Estate late	456
Hofmeyr, Isabella, Petition	386
„ v. Shaw	416
Holtman v. Holtman	448
Hopewell v. Conroy	457
Hudson, Vreede & Co. v. Saunders ...	381
Hughes v. Stent	13
Hugo v. Lotter	267
Hurnan v. Ras	429
Hurter, J. A., Estate late	294
Incorporated Law Society v. Gardner ...	8
„ „ v. McColla ...	85
„ „ v. Milligan ...	7
Jackson, *re*	59
„ *ex parte*	34
„ v. Oosthuizen	1
Jacobs, M. S., *ex parte*	416
Jacobsohn, S. S., *ex parte* ...	367, 465
„ v. Greyling	456
Jenner, R. D., *ex parte*	225, 382
Jones, C. F., *ex parte*	225
„ E. S. F., *ex parte*	392
„ *ex parte*	6
„ (Minor), *in re*	257
„ v. Town Council of Cape Town...	73
Joseph v. Calitz	297
„ v. Potgieter	239, 297
Kaffrarian Steam Milling Co. v. Registrar of Deeds	274
Katzenstein v. Powell	334
Kempster v. Vyvyan	392

	PAGE
Kett, G. F. W., Petition	256, 293, 386
Kindi v. Murray	60
Kingsley, Helena, *in re*	256
Klosser, Elizabeth C., *ex parte*	494
„ H. F. A., *ex parte*	465
Knoop, J. N., Estate late	340
Kotze, J. C. G. (minor), *in re*	116
Krige, J. D., *ex parte*	98
„ M. S., *ex parte*	416
Kruger, Pelser & Co. v. Van der Walt	57
Krynauw & Co. v. West...	239
Kuhn, *ex parte*	4
Kuun v. Harris	73
Labuscagne (Minors), *re*...	494
Lake v. Lake	52, 85
Lambert, *ex parte*...	51
Langeman v. Brown	429
Langerman v. C. W. Brown	465
Langschmidt v. Russouw	32
Latsky, Johannes Michael	107
Lawton v. Sea Point Municipality ...	236
Lazarus, S., *in re*	375
„ *ex parte*	85
Leach (Minors), *in re*	328
Le Grange, *ex parte*	2
Lemue v. Swaartbooi	424
Leng v. Nestadt	493
Lennox, George St. L., Estate of ...	141
Le Roex, Elizabeth C. J. M., *in re* ...	377
Le Roux (Minors), Estate, *in re* ...	243
„ (Minors), *ex parte*	347
„ Insolvent Estate of	60
„ v. Le Roux	382
Lespade, J. S., Insolvent Estate ...	227
Le Sueur v. Marais	106
Levi, E. H., and Wife, Petition of ...	227
Levy, J., *ex parte*	382
Lewis, I., *in re*	499
„ v. Lazarus	429
Liebenberg v. Stewart	410
Lindley & Wood v. Gedye and Others	112
Lippert v. Parkin	168
Lithman & Co. v. Falconer	1
„ v. Pepler	72
Lloyds, J. S., Insolvent Estate of ...	168
Lotter (Minors), *ex parte*	108
Louw's Executors v. Louw and Others	359
Louw (Minors), *re*	394
Louwrens (Minors), and Potgieter, *in re*	495
Loxton (Minors), *in re*	201
„ S., Petition	122
Lucke v. Gray	362
Ludolph, *ex parte*...	85, 98
Luyt v. Kriegler	97
McDonald, W. G., Petition of	416
Macfarlane v. Brunette	278
MacIntosh v. Botha	13, 51
Madden v. De Lacy	367
Maddison v. Bosman	57
Mahuma, H., Petition of	383
Main v. Chatterton	494
Malan v. Malan	108, 143, 376
Malcolm, *ex parte*...	2
Malherbe, D. M., *ex parte*	392
Mandy, G. E., Insolvent Estate... ...	258
Marais, J., Insolvent Estate	377
„ J. P., Insolvent Estate of ...	389
„ and Others v. Van Graan and and Others	456
Marais and Parrott's Ante-nuptial Contract	51
Marnewicke, A., Petition ... 404,	496
Martin v. Purchase	275
Martin's Trustee v. De Villiers 334,	421
Martinus' Executor v. Martinus 334,	429
Maskew's Executors v. Truter's Executors 149,	285
Master Sup. Court v. Owen's Executor	148
„ v. Du Plessis' Executor ...	381
„ v. Lynch's Trustees ...	457
„ v. Talbert's Sureties ...	392
„ v. Viljoen's Executor ...	381
Maxwell, Earp & Co. v. Gous	1
Maxwell & Earp v. Lloyds	168
McCabe, J., Insolvent Estate	240
McCallum, Ethel M., Petition	340
McDonald, *re*	57
McLeod v. Cape Nitrates Syndicate ...	98
McMunn and Others v. Powell's Executors	65
McWilliam, W., Estate late	148
Meiring v. Kruger	210
Meitje v. Matyele	421
Melass, A., Estate of	115
Mellish, F. J., *ex parte*	200
Metelerkamp v. Ackermann	465
Metzler v. Metzler 174,	240
Meyburgh, J. L., *ex parte*	225

	PAGE
Meyer's Executrix, *ex parte*	59
Meyer, G. H., Insolvent Estate	494
„ J. A., Estate	123
„ *re* Estate of	2
Michaelis v. Pretorius	279
Michaelson v. Muller	276
Michau, G. N., *in re*	324
Midland Agency and Trust Company v. Smith	465
Milne v. Robertson	502
Moetsi v. September	359
Molony v. Conradie's Executor	205
Moodie, G. P., Estate late	243
Mordecai, *ex parte*	116
„ v. Cape Lime Co.	141
Mthusthea v. Mswelo	492
Muller, P. F., *ex parte*	148
Murison v. Pool	387
„ v. Ross	255
Murphy v. Murphy 33, 85,	193
„ v. Neser	224
Mutual Hall Co. of East London 393,	465
Mosenthal v. Hasselbach 239,	285
Mostert, *ex parte*	334
„ v. De Villiers	381
Myburgh v. Registrar Deeds	228
Naude, J. G., *ex parte*	494
Neethling's Trustees v. Alford, Wills & Co.	335
Nel, G., Estate late	293
Neser, *ex parte*	14
Neser v. Innes	316
Newcombe, R., sen., Estate late	274
Nichol (Minor), *in re*	457
Nieuwoudt v. Slavin and Jowell ...	79
Nortje, J. J. J., Estate late	341
„ *re*	57
Nyavri, Jafta, Estate	293
Olivier v. Potgieter and Another ...	312
„ v. Potgieter	381
„ v. Steyn	224
O'Reilly, G. J., *ex parte*	187
Ormond v. Fitzgerald	406
„ G. A., *in re*	256
Otto, *ex parte*	2
Oxer, J., Estate late	257

	PAGE
Paarl Bank (in liquidation) 122, 175, 324, 377,	403
Paarl Fruit Preserving Co.	241
Paarl Fruit Preserving Co. (Liquidators), *ex parte*	227
Pamie, Fortuin, *ex parte*	240
Peach & Co. v. Simon's Trustee 18,	87
Pearce v. Claremont Municipality and Others	251
Pearston Municipality, *ex parte*	6
Pederson v. Hughes	335
Peterson, G. H., *in re*	240
Phillipson (Minor), *in re*	465
Pirie, Louisa, Petition	377
„ v. Pirie 225, 248,	471
Pitt, E. T., *in re*	240
Poggenpoel, S. J., Petition	257
Poppe v. Bate & Co. 14,	23
Popta, L. J.	376
Potgieter (Minor), *in re*	416
„ v. Olivier	312
Pretorius (Minors), *re*	116
„ S., jun., *ex parte*	376
Priest, J., *ex parte*	148
Prince and Others v. De Jager	105
Prinsloo v. Robberts and Another ...	423
Pritchard v. Factor and Lax	120
„ v. Amy H. Lax	120
Quin, *ex parte*	85
Raaff v. Fitzgerald	1
Rabie, J. C., *ex parte*	392
Randall v. Graham's Town Municipality	275
Rathfelder v. Helm	187
Rau, C. F., Petition	340
Rawstone, E. A., *in re*	240
Regina v. Adams	59
„ v. Alexander	97
„ v. Armstrong	434
„ v. Ballie	187
„ v. Bendukker	52
„ v. Blumenthal	498
„ v. Buchenroeder	175
„ v. Conroy	429
„ v. Richard Curtis	294
„ v. Damon Charles	34
„ v. Deydier	418
„ v. Geary & Crystal	128

	PAGE
Regina v. Golding	221
„ v. Goliad Belelie	236
„ v. Holder	118
„ v. Huysteen	356
„ v. Izaack Tomato	11
„ v. Jan Aaron	408
„ v. Jooste	11
„ v. Klaas	381
„ v. Loots	151
„ v. Louw and Others	276
„ v. Matati	175
„ v. McDonald	423
„ v. Mohr	499
„ v. Mteto	248
„ v. Nokitshini and Drayi ...	436
„ v. Otto	261
„ v. Pietrus	97
„ v. Plaatje Simon...	62
„ v. Robertson and Others ...	389
„ v. Schultz	211
„ v. Shaw	70
„ v. Sigcau	509
„ v. Swart	102
„ v. Turnbull and Others ...	123
„ v. Van der Westhuizen ...	233
„ v. Van Stade and Others ...	356
„ v. Van Zyl	127
Reid, F. G., *ex parte*	382
Reiss, *ex parte*	122
Remerson, Sauer & Co. v. Baldwin ...	239
Ricci, *ex parte*	85
Robertson v. Mowbray Municipality ...	98
Robinson (Minor)	233
Roos, J. de V., *ex parte*	312
Ross v. Ross & Archer	144
Rosslee, *ex parte*	4
Rossouw, D. H., and Another, Petition	456
Russo, *in re*	207
Rutherfoord v. Le Grange and Another	273
Ryklief and Others v. Ryklief's Executrix	88
Sapiers, M., Petition	294
Sasin v. Brauer	361
Sauer v. Civil Commissioner, Cape ...	258
Scallan, J., *in re*	340, 382
Scanlen & Syfret v. De Villiers... ...	494
Schaap v. Solomon	397
Schiffman, F., Estate	257
Schmidt (Minors)	257

	PAGE
Schoeman, C. J., *in re*	324
„ J. A., *in re*	324
Schonken, W. P., Estate late	368
Schreibe, W., *ex parte*	377
Schreiber, W., Petition	466
Schroeder v. Colonial Government ...	235
Schroeder v. Heyns	54
Schunke, *ex parte*...	98
Schweizer, N.O. v. Sun Fire Insurance Company	476
Scott v. Clarke & Co.	53
Scott, Gertrude F. C., Petition	285
Searight & Co. v. Factor and Lax ...	382
Shaw v. Adamson	105
Shaw v. Moorhead	404
Sheard, Cecilia F., Marriage Settlement of	324
Simms v. De Smidt	461
Simonse, S, *ex parte*	102
Sirvundla, Petition	324
Skead, Cuthbert S., and Wife, Petition	494
Slebusch, J. M. S, Insolvent Estate ...	434
Smalberger, J. M., *in re*	273
Smalberger, J. W., Estate late	377
Smalberger (Minor), *in re*	202
Smit's Executors v. Carsten and Others	224
Smit v. Smit's Executrix	504
„ v. Smit	101
„ W. J., *ex parte*	85
„ W. J., Insolvent Estate	376
„ W. J., Petition 466,	494
Smith, *ex parte*	122
„ H. M., Petition	324
„ v. Morrison	391
„ v. Small	2
„ v. Smith ... 7, 201, 205, 225, 242, 256, 346,	381
Smith v. Van der Merwe...	84
Smuts v. Cathcart Divisional Council ...	384
Smythe, J. S., Insolvent Estate of ...	340
South African Association v. De Jongh	51
„ „ v. Van Zyl...	97
„ „ v. Vorster ...	1
South African Mutual Life Assurance Society, Petition	201
South African Saltpetre Fields v. Power	340
Southey's Estate, *re*	10
Southey v. Leeb 98,	103
Spies, J. H., *in re*...	240
Startup, J. C., *ex parte*	346
Steenkamp v. Paulsen	97

PAGE

Steenkamp v. Van Wyk 106
Steensma, *ex parte* 2
Steer, A. W. 382
Stevens, H., Petition 150
Stevens v. Smith 347
Stevenson v. Stevenson 323
Steyn, J. L., *in re*... ... ... 225, 347
Stumke, *ex parte* 85
Sturk v. Dieterle 465, 484
Stuurman and Others, *in re* 249
Sullivan v. Sutton 489
Swarts v. Dice 128
Sypkins v. Prinsloo 1

Table Bay Harbour Board v. Metropolitan and Suburban Railway ... 372
"Tasmania," The, *in re* 390
Taylor, E. H., Estate late 273
Teich, il, *ex parte* 201
Terblanche v. Oudtshoorn Municipality 304
Teubes, A. G. H, Petition of 149
Theron, C. J. F., *ex parte* 416
Theron v. Tiffin 305
Theunissen, P. R., *in re* 324, 456
Thomas, *re* 57
Thompson, *ex parte* 14
Tiran, C. P. (Minor), *ex parte*, 274, 376, 403
Titterton (Minors), *in re* 429
Townsend, J. R., *ex parte* 367
Trill v. Van Ryn... 367
Trollip v. Best 490
Trollip v. Scott 255
Tsikila, Jafta, Petition 240
Turton, *ex parte* 2
Turvey v. Pienaar 174, 239

Union Bank, Cape Town (in liquidation) 20, 210, 347, 387

Van As (Minor) 233
Van As v. Nel and Nel's Executors ... 471
Van den Heever v. Kruger 108, 116, 200
Van den Heever v. Smit 120
Van der Byl v. Van der Merwe ... 285
Van der Hoven (Minors), *re* 99
Van der Hoven, H. J., *ex parte* ... 416
Van der Merwe, C. J., *ex parte* ... 107
" " (Minor) 387
" " (Minors), *in re* ... 471
" " *re* 86
" " v. Theron ... 255, 260

PAGE

Van der Poel v. Van der Poel 190
Van der Tuuk, *ex parte* 98
Van der Vyver v. Deary ... 434, 466
Van der Vyver's Executors v. Swanepoel 239
Van der Westhuizen, J. H., *in re* ... 375
Van der Westhuizen, J. M., Estate late 376
Van de Wall v. Van de Wall's Executors 357
Van Eyssen, M. J., *in re* 324
Van Gass, G. G. N. and Wife, Insolvent Estate 243
Van Heerden, H. J., *ex parte* 392
Van Jaarsveld, J. L., Petition 393
Van Jaarsveldt (Minors), *in re* ... 126
Van Noorden v. Falconer 1
Van Noorden v. Le Roex 239
Van Niekerk, *re* 102
" W. D., *ex parte* 236
" v. Fleischer 15, 123, 149
" v. Hugo's Trustee 124, 364
Van Pelt, *ex parte* 495
Van Reenen, J., *ex parte* 392
Van Veuren (Minors), *ex parte* 202, 340
Van Wiesge's Executors v. Home ... 239
Van Wyk's Executrix, Petition ... 376
Van Wyk, Insolvent Estate 491
" W. J., Insolvent Estate 365, 504
" L. P., *ex parte* ... 107, 116
" v. Registrar Deeds 110
" v. R.M., Willowmore ... 225
Van Wyk's Trustee v. Van Wyk and Others 448
Van Wyk v. Van Wyk, Trustee of ... 504
Van Wyk v. Wildridge 395
Van Zyl, G. C., Estate 375
Van Zyl (Minors), *ex parte* 368
Venn (Minors), *in re* 202
Verdoes, P. J., Insolvent Estate 243, 256
Verity, J. 240
Vermooten, O. S. 382
Verster v. Bent, *alias* Bentley & Co. ... 465
Vertreau, J. J., Petition 393
Victoria Salt Syndicate, *in re* 456
Victoria Woollen Factory, Limited (in liquidation) v. David Draper ... 476
Viljoen, *in re* 52, 86
" v. De Villiers 403
" v. Viljoen 377
Visser (Minor), *in re* 496
Vollmer & Co. v. Rossouw 84
Vorster v. Orsmond 194

	PAGE
Vos v. De Greef	276
Vosloo, G. C., *ex parte*	494
Vosloo, L. D., *ex parte*	494
Vyvyan, H. S.	386
Wait v. Van Rooyen	106
Walker v. Walker	388
Walker's Executors v. Eksteen's Executrix	49
Walker's Executors v. Pretorius	1
Warner, *ex parte*	98
Watkinson, Insolvent Estate of	233
Watson v. Watson	239
Welch v. Welch	14
Wellington Municipality, Petition	393
Wells, J. L., *ex parte*	107
Wells v. Roudebosch Municipality	308
Welsh, A. R., *ex parte*	494
Wessels v. Wessels	202
Western Province Bank, *in re* ...	403, 466
White, Muller & Co. v Spendlove	32
White, *re.—Ex parte* Whelan ...	99
Wicht v. Hudson	97
Wiggins, J. J., *ex parte*	168
Wild v. Harrison	484
Wildredge, *ex parte* ... 52, 99, 168,	241
Wildsing, C., estate late ...	386
Wiley & Co. v. Loubser	84
Will v. Humphries	4
Williams, Louisa, Petition ... 257,	347
Williams v. Williams	215
Williamson v. Williamson ...	200
Willowmore D.C. v. Des Vages...	209
Wilson v. Baker	233
Wiltshire v. Wiltshire 21,	122
Wirth, E. O. E., *in re* 240,	256
Wolfe v. Perrins	73
Wolstone, Fanny L., Petition ...	494
Wood v. Botes	56
„ E. J., *ex parte*	187
„ v. La Grange	72
Woodhead, Plant & Co. v. Petersen & Co.	497
Workerich v. Peters	148
Wylie v. Wylie 3, 213, 256,	258
Wyllie v. Wells and Turner	13
Yates (Minors), *in re*	232
Yates v. Wiid	138
Zeederberg v Bloem and Brill	465
Zeederberg, Duncan & Co. v. Braude & Co.	1
Zeederberg & Duncan v. Bloem and Brill	476
Zoer's Executors v. Colyn	224
Zondagh (Minor), *in re*	242

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

MAXWELL, EARP AND CO. V. GOUS. } 1896. Jan. 13th.

Mr. Buchanan moved for the final adjudication of the defendant's estate.

Granted.

EKDERREEG, DUNCAN AND CO. V. BRAUDE AND CO.

Mr. Buchanan asked that the provisional order might be superseded.

Granted.

BOURHILL'S EXECUTOR V. ARK OF SAFETY LODGE.

Mr. Tredgold applied for provisional sentence upon two mortgage bonds, one of £200 and the other of £300, passed by the defendant and another as trustees of a certain benefit lodge in Caledon, and for the property to be declared executable.

Granted.

VAN NOORDEN V. FALCONER.

Mr. Watermeyer applied for provisional sentence upon a promissory note for £350, and interest from the 12th November.

Granted.

SYPKINS V. PRINSLOO.

Mr. Smuts applied for provisional sentence upon a mortgage bond for £100, together with 7 per cent. interest from 1st January, 1895, and 16s. 6d. insurance premiums. The defendant was living in Pretoria, and personal service had been effected. Counsel further applied that the property be declared executable.

The Court granted provisional sentence, and declared the property executable. Judgment was given for the amount of the insurance premium, subject to the production of the receipts.

JACKSON V. OOSTHUYSEN.

Mr. Smuts applied for provisional sentence upon a promissory note for £233 6s. 8d., with interest at 6 per cent., and for notarial charges to the amount of £1 5s. 2d.

Provisional sentence granted.

LITHMAN V. FALCONER.

Mr. Close applied for provisional sentence upon balance of promissory notes for £230 10s. 11d. and £209 8s. 1d.

Granted.

RAAFF V. FITZGERALD.

Grosse—Notarial bond – Provisional sentence.

Mr. Watermeyer moved for provisional sentence on the grosse of a notarial bond for £150, passed before a notary of the South African Republic. A certificate was before the Court that the bond was registered in the Debt Register of the South African Republic.

Provisional sentence was granted as prayed.

SOUTH AFRICAN ASSOCIATION V. VORSTER.

Mr. Sheil moved for provisional sentence on a mortgage bond for £1,000, with interest and costs.

Provisional sentence granted, and property declared executable.

WALKER'S EXECUTORS V. PRETORIUS.

Mr. Smuts applied for provisional sentence on a mortgage bond for £150, and interest at 7 per cent. from 1st July, 1895, and 8s. 6d., insurance charges.

Granted.

LITHMAN AND CO. V. FALCONER.

Mr. Close applied for provisional sentence upon promissory notes for £230 12s. 1d. and £448 6s. 4d. respectively, with interest and costs.

Granted.

ILLIQUID ROLL.

ANDERSON V. FALCONER.

Mr. Close applied for judgment upon a consent paper.

Granted.

SMITH V. SMALL.

Mr. Sheil applied for judgment, under rule 329, for £36 6s. 6d., with interest *a tempore morœ* and costs.

Granted.

ADMISSION.—*Ex parte* MALCOLM.

Mr. Benjamin applied for the admission of Duncan Robert Malcolm as attorney-at-law.

The application was granted, the oaths to be taken before the Resident Magistrate, Queen's Town.

REHABILITATIONS.

Mr. Molteno applied for the rehabilitation of Andries Marthinus le Grange.

Granted.

Mr. Tredgold applied for the rehabilitation of Stephanus Willem Daniel Otto.

Granted.

Mr. Graham applied (1) for the rehabilitation of Coenraad Willem Johannes Marthinus Steensma, and (2) for the release of his estate under his second insolvency.

Granted.

Mr. Buchanan applied for the rehabilitation of Charles Turton.

Granted.

GENERAL MOTIONS.

In re ESTATE OF N. MEYER. { 1896. Jan. 13th.

Child-bearing age—Presumption.

There is no fixed rule of law as to the age at which a woman must be conclusively presumed to be past child-bearing, but after the age of 50 less evidence would be required than before.

Upon an application by executors of M. *for leave to sell certain land bequeathed by him to his daughter* N. *and in case of her decease without issue to certain persons in remainder,*

Held, *that as* N. *was fifty-four years of age, and although married for over fifteen years had born no children, proof that her change of life had occurred would complete the presumption that she was past the age of child-bearing, and* ordered, *that upon production of such proof and with the consent of the persons entitled in remainder the sale be authorised.*

This was the petition of William Arthur Currey, in his capacity as the secretary of the General Estate and Orphan Chamber of Cape Town, and William Edward Moore, of Cape Town, in their capacity as the surviving executors testamentary of the estate of the late Nicolaas Wallessen Meyer in his lifetime of Rosebank, in the Cape Division.

On the 18th July, 1876, N. W. Meyer, since deceased, made and executed his last will and testament, by which the General Estate and Orphan Chamber and Mary M. Meyer, the testator's wife, were appointed executors and administrators of the estate.

By a codicil to the will the testator appointed William Edward Moore to be an executor and administrator jointly with the General Estate and Orphan Chamber and Mary Meyer.

Mary Meyer is now dead.

The testator by his will directed *inter alia* that his wife should during her lifetime have and enjoy the use of a certain house called "Fairbank," situate at Rosebank, or the rent thereof, and that upon her death the testator's daughter, Mary Ann Cecilia Meyer, should have and enjoy the use of "Fairbank," and upon her death, the house should go and devolve upon her lawful issue, but in case she should not have such issue, then the house should go and devolve upon her brothers and sisters, her surviving, free of mortgage.

N. W. Meyer died on 6th February, 1880, and after his death his widow, who survived, him, continued to have and enjoy the use of the house "Fairbank," or the rent thereof, until her death. In 1881 the testator's daughter Mary Ann Cecilia Meyer married in England the Rev. B. W. Clinch. That marriage still subsists; there has however been no issue of it, and for some years Mr. and Mrs. Clinch have lived apart.

Mrs. Clinch (M. A. C. Meyer) was at the date of the application 54 years of age or thereabouts.

Since the death of the widow Meyer "Fairbank" has been let and the rent paid to Mrs. Clinch, after deducting such expenditure as was necessary for repairs. "Fairbank" is an old house and the petitioners alleged that the expenditure for repairs was out of proportion to the return derived from it, and that certain

structural renovations and extensive repairs were moreover urgently required which were estimated to cost £153.

The petitioners further alleged that it would most distinctly be to the advantage of Mrs. Clinch, and of the persons to whom the house would ultimately devolve, that the house should be sold, as it was steadily deteriorating in value, and the market for landed property was now good.

That the Registrar of Deeds, in view of the terms of the will, declined to pass transfer without the consent of the Court.

The prayer was that the petitioners might be permitted to sell the house, either privately or by public sale, upon the condition that the proceeds thereof, after deducting the costs of the sale and of the present application, should be invested upon the like trusts as were by the will prescribed in respect of the house, or, that they might be permitted to mortgage the property for such sum, not exceeding £200, as might be required for the repairs, and for the costs of the application and of the bond.

Mrs. Clinch and her brothers and sisters consented to the sale on condition that the proceeds were invested in terms of the trust constituted by the will.

Mr. Searle, Q.C., was heard in support of the application; and as to the presumption that a woman of fifty-four years of age was past child-bearing, cited *Davidson* v. *Kimpton* (L.R., 18 Ch. Div., 213); *Croxton* v. *May* (L.R., 9 Ch. Div., 388); *In re Widdow's Trusts* (L.R., 11 Eq., 408); *In re Millner's Estate* (L.R., 14 Eq., 245).

The Court authorised the sale.

De Villiers, C.J.: I quite adopt the view that no fixed rule of law can be laid down as to the age at which a woman must be conclusively presumed to be past child-bearing. After a woman has reached the age of fifty the Court would not require the same degree of evidence as when she is under that age, but some further evidence will be required to support the presumption that she will not bear children. The lady in question is fifty-four years of age and, although she has been married for over fifteen years, she has never borne any children. If in addition to these circumstances there had been proof that her menstruation has ceased, the presumption would in my opinion be conclusive that she is past child-bearing. The parties entitled to the house, in remainder, in the event of her dying without issue, consent to the sale of the house, and the Court will make an order authorising such sale upon production of an affidavit made by the lady or her medical attendant that her change of life has occurred.

[Applicant's Attorney, E. J. Moore.]

WYLIE V. WYLIE. { 1896. Jan. 13th.

This was an application on notice to the respondent calling upon him to show cause why he should not be ordered forthwith to pay over to the applicant, his wife, the sum of £50 to enable her to defend the action instituted against her by her husband, the respondent, for restitution of conjugal rights, custody of the children of the marriage, and forfeiture of all benefits conferred upon her under her ante-nuptial contract. The applicant alleged that she wished to defend the action, and that she was advised that she had a good defence. That she was without means to meet the cost of the defence, and had applied, through her attorneys, to the plaintiff to pay her the sum of £50 to meet such costs, and that he had refused on the ground that he had no means. That the plaintiff was not suing as a pauper, and appeared to have sufficient money to supply his own wants. That since January, 1894, she had been compelled to support herself and four children by keeping a boarding-house at Sea Point. That she had been obliged to contract debts, and was now being sued by her creditors.

The respondent alleged that he had no fixed income, and depended solely on what he earned as a journalist, and had no fixed engagement. That the applicant possessed furniture to the value of £300, and carried on a large boarding-house at Sea Point. That it was untrue as stated by her that she had maintained herself and children without his assistance; that on the contrary when at Johannesburg, he from time to time made her advances, and undertook to pay upwards of £80, debts contracted by her, and which he was paying off by monthly instalments. The applicant, in reply, stated that the furniture had been bought with borrowed money, which had not been repaid. In reply, the respondent alleged that two writs of civil imprisonment had recently been issued against him for debts contracted by his wife, and that he was in insolvent circumstances.

Mr. Graham for the applicant, and Mr. Sheil for the respondent.

The Court made no order. The question of costs to abide the result of the trial.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, J. C. de Korte.]

IN THE ESTATE OF THE LATE JOHN BELL.

Mr. Watermeyer applied for leave to the executrix testamentary to sell certain two pieces of vacant land, the property of the estate, situate in Cape Town, for the purpose of

satisfying certain registered mortgage claim on landed property, situated in Glasgow, in terms of a compromise arrived at with the mortgagee.

Granted.

Ex parte KUHN. { 1896. Jan. 13th.

Transfer deed—Change of transferee's name.

Where a person, whose real name was Powell, *but who had been brought up, confirmed, and married under the name of* Kuhn, *bought property, which was transferred to him under the name of* Powell, *the Court, at his request, authorised an amendment of the transfer deed by inserting the name* Kuhn *for* Powell.

This was the petition of Willem Johannes Kuhn.

The petitioner alleged that his parents' names were John and Elizabeth Harriet Powell and that he was baptised by the name of John William Powell.

That when he was a child his mother died and he was handed over to the care of Andries Johannes Kuhn and his wife, with whom he lived until the death of Mrs. Kuhn about a year ago.

That during the time he lived with the Kuhns he was always known as Willem Johannes Kuhn. That he was confirmed in the Dutch Church under that name, that he was married under it, and that all his children bear the name of Kuhn. That he was not aware that he had ever been known as John William Powell until June, 1894, when he met a brother of his who informed him of the fact.

That he had purchased certain property in Montagu, which was transferred to him as John William Powell on the 17th October, 1894, and that as he had always been known as Willem Johannes Kuhn he was desirous of having the transfer altered, but the Registrar of Deeds declined to do so without an order of Court. The prayer was that the Court would be pleased to grant an order authorising the Registrar of Deeds to amend the deed of transfer by striking out the words "John William Powell" and substituting the words "Willem Johannes Kuhn."

Mr. Molteno moved.

The Court authorised the amendment as prayed.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

THE PETITION OF SAMUEL P. ROSSLEE.

Mr. Molteno applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of certain erf, No. 38, situate in York-street, George, given to the petitioner in the year 1850, but never transferred.

Granted.

WILL v. HUMPHRIES. { 1896. Jan. 13th.

British Bechuanaland Annexation Act, 1895—Magistrate's Court—Pending causes—Final judgment or sentence—Civil imprisonment.

Final judgment having been given before the annexation of British Bechuanaland, by a Resident Magistrate's Court of that territory, for an amount exceeding the jurisdiction which such Magistrate's Court could exercise after such annexation,

Held, *that the Magistrate's Court had no jurisdiction, under the 11th section of the Annexation Act, to issue a writ of execution or grant a decree of civil imprisonment upon such judgment, but that judgment should have been obtained in a higher court, having the requisite jurisdiction, upon the judgment given before annexation.*

This was the petition of Richard Humphries for his release from the gaol at Upington, Gordonia, in which he was detained at the date of the application.

The petition set forth that the petitioner was arrested by the plaintiff, the present respondent, a resident of Upington, on the 20th July, 1895, in order that he could sue the applicant and his firm (J. and R. Humphries), of the German Protectorate, West Africa at Upington on a promissory note for £461 4s. 6d., originally due by his firm to Messrs. Hill & Paddon, of Kimberley, and made payable at Kimberley, which note he stated had been ceded to him.

The petitioner alleged that he had the gravest suspicion that the cession was not a *bona-fide* one for value, but merely to facilitate collection in Gordonia (a territory adjacent to the German Protectorate) by the plaintiff, an attorney.

When the petitioner was arrested and sued 23rd July, 1895, he confessed judgment, and was re-arrested, as he had sworn that he had no means to satisfy the judgment,

The Magistrate however suspended the order for the re-arrest for three months in order to enable the petitioner to proceed to Keetmanshoop in the German Protectorate, where the petitioner's partner was last heard of, to ascertain if the firm had any assets there.

The petitioner failed to discover any assets, and found that his partner had left that part of the country and was transport-riding.

The petitioner then returned to Upington and on the application of the respondent the Magistrate, not the same Magistrate who had tried the original case, granted a decree of civil imprisonment against the petitioner on the 11th December, 1895.

The petitioner alleged that the promissory note on which he was sued was given in respect of goods which his firm had bought on credit from Hill & Paddon.

That they (J. and R. Humphries) had in turn given credit to the Veldschoendragers, with whom they were trading, but that the Chief Witbooi came and rooted out the Veldschoendragers, the firm lost all its property and could not pay Hill and Paddon.

Final judgment was given against the petitioner on the 23rd July, 1895, before the annexation of Bechuanaland to the Colony. The decree of civil imprisonment was granted after the annexation, viz., on the 11th December, 1895, and by a different magistrate to the one who had given final judgment.

Under the circumstances above detailed the petitioner prayed for his release from gaol.

At the hearing of the case before the Magistrate the petitioner's evidence, which was not disproved, went to show that he had no assets.

Mr. Graham, for the respondent, consented to the matter being heard as though on appeal from the Magistrate's judgment.

Mr. Juta, Q C., in support of the application: The Magistrate had no jurisdiction to order a decree of civil imprisonment on a judgment not delivered by himself. The Courts in Bechuanaland created by Proclamation were not the predecessors of the Courts created by the Act 41 of 1895, and consequently the Magistrate on this ground also had no jurisdiction. The plaintiff's remedy was either to have applied to the High Court or to the Supreme Court for process in aid *Nixdorp* v. *Turvey* (1 Ros. 360).

Mr. Graham for the respondent: Before the annexation the Magistrate of Gordonia would clearly have had jurisdiction, and it is submitted that it was the intention of the Legislature that the Magistrate's Court created by Act 41 of 1895 should deal with cases pending as though that Act had not been passed: see section 11 (*a*). If it were not so a suitor, in the position of the present respondent, would be without remedy, as sub-section (*b*) only applies to appeals from decisions of the Court. If the petitioner has no assets application for his release should have been made to the Magistrate: see *H.* v. *Bossi* (4 Juta, 72).

De Villiers, C.J.: I am of opinion that the applicant must be released from imprisonment. It is quite true that the 11th section of the British Bechuanaland Annexation Act, 1895, provides that "all pending causes, civil or criminal, may be continued by the Court of Resident Magistrate to final judgment or sentence as though the Act had not been passed." The object of the proviso is not clear. The existing Courts of Resident Magistrate were to cease to exercise their former jurisdiction: but, as to pending causes, the time and trouble expended upon them were not to be lost and the Courts were therefore empowered to continue such causes to final judgment or sentence. In the present case final judgment had been given before the taking effect of the Act. If therefore it became necessary, after the annexation, to obtain execution upon that judgment the aid of a Court exercising a higher jurisdiction became necessary. This Court exercises such jurisdiction. It was quite competent for the plaintiff to obtain provisional sentence in this Court upon the judgment. In *De Vos* v. *Voersee* (3, J. 79), a writ of attachment against landed property was refused upon a judgment of a Magistrate's Court although there had been a return of *nulla bona*, but it was specially stated that provisional sentence might have been obtained on the judgment, in which case there would have been no obstacle to the issue of further process. In the subsequent case of *Hopefield D. R. Church* v. *Bok* (7, J. 65) the course, thus indicated, was followed. The headnote states that "where a return of *nulla bona* was made to a writ upon a judgment obtained in a Magistrate's Court, the Court granted a writ against the immovable property without requiring the issue of another writ against movables." This is correct, so far as it goes, but the fact ought to have been added that provisional sentence was first prayed and granted upon the judgment. In the present case I am clearly of opinion that the only mode in which the plaintiff can avail himself of his judgment is by obtaining the judgment of a higher Court having jurisdiction, and the defendant's application must therefore be granted with costs. Independently of the legal question, the evidence goes to show that the

defendant has no assets, and, if this be so, the Magistrate, even if he had jurisdiction, ought to have ordered the defendant's release.

Their lordships concurred.

[Applicant's Attorney, G. Montgomery-Walker; Respondent's Attorney, Gus Trollip.]

Ex parte JONES. { 1896. Jan. 13th.

Minor- Landed property—Sale—Debts.

The Court authorised the sale of a farm, purchased by a father on behalf of his minor son, to pay the amount of a bond and other charges on the property.

The following was the petition of Charles Frederick Jones, in his capacity as father and natural guardian of his minor son, Cyril Charles Jones.

1st. That in the year 1885, your petitioner purchased for his said minor son the farm Bellevue, situate in the division of Stellenbosch, for the sum of £1,100 0s. 0d. and transfer of the said farm was thereafter d ly passed to your petitioner in his said capacity.

2nd. That when your petitioner purchased the said farm it was a wine farm, but that owing to the attacks of the phylloxera the vineyards have been almost completely destroyed.

3rd. That in order to pay for the said farm your petitioner with the leave of your Honourable Court obtained a loan of £650, on mortgage of the said farm. The balance of the purchase money having been made up partly from the amount forfeited by Paul Neethling as is hereinafter set forth and partly from money belonging to your petitioner.

4th. That in or about the month of October, 1885, your petitioner sold the said farm to one Paul Neethling for the sum of £1,100.

5th. That thereafter the said Paul Neethling took possession of the said farm and remained in the occupation thereof for a period of about six months, when finding that owing to the ravages of the phylloxera and other causes he could not make the farm pay, and not being possessed of capital to enable him to adapt the said farm to other sources of revenue, the sale was by mutual consent abandoned and the sum of £400 paid by him on account of the purchase money to me forfeited.

6th. That seeing no likelihood of being able to sell the said farm in its then condition I took over the management thereof and commenced planting orchards, &c., in the place of the vineyards which had been destroyed as aforesaid.

7th. That in order to obtain money to pay for the costs of trees and labour, to pay the interest on the mortgage bond and road rates, as the farm was then yielding little if any revenue, and not being possessed of any means myself other than my salary as manager of the Standard Bank of Stellenbosch, I borrowed money from my wife from time to time. That the amounts so borrowed amount to the sum of £2,000 and upwards.

8th. That in the month of December last I was sued by the trustees of the insolvent estate of one Meyer, of Stellenbosch, upon an account alleged by him to be due by me, and in consequence thereof had to resign my situation and surrender my estate.

9th. That since then I have not been able to obtain any other situation, and as my wife's money is exhausted I am unable to continue operations on the said farm and to support my family.

10th. That as the orchards planted by me are still young I do not anticipate that the farm will yield anything like a return for the money expended on it for some years. In the meantime money will be required for the purpose of paying the interest on the bond, the road rates, and cost of labour, &c.

11th. That as the return from the farm will not be sufficient to meet these expenses I will be unable to continue to cultivate same, and the consequence will be that it will seriously depreciate in value.

12th. That the Divisional Council valuation of the said property is £775.

Wherefore your petitioner prays that it may please your Honourable Court to grant him an order authorising him to sell the said farm and out of the proceeds thereof to pay off the amount of the mortgage bond thereon, with the interest due in respect thereof, and to appropriate the balance of the purchase money, if any, towards liquidating the debt due to your petitioner's wife as aforesaid, or that your petitioner may have such other and further relief as to your Honourable Court may seem meet.

Mr. Molteno moved.

The Court authorised the sale, and directed that any balance which might be left after the payment of claims should be paid into the Guardian's Fund to the credit of the minor.

[Petitioner's Attorneys, Messrs. Sauer & Standen]

THE PETITION OF THE PEARSTON MUNICIPALITY. { 1896. Jan. 13th.

Mr. Molteno applied to make absolute the rule *nisi* issued under the Titles Regis-

tration and Derelict Lands Act, for the sale in execution of certain lots of ground situated in the said Municipality, abandoned and left derelict, for the rates due thereon.

Granted.

Ex parte KERKRAAD, DUTCH REFORMED CHURCH, WYNBERG. } 1896. Jan. 13th.

Trust—Land—Religious purposes—Sale.

The Court authorised the sale of certain land and buildings at Mowbray, which had been transferred to the Minister and Church, wardens for the time being of the Dutch Reformed Church, Wynberg, their assigns and successors in office, subject to the condition that the ground and erections should be used for religious purposes only, the property being useless to the Church, and the heirs of the donor raising no objection to the sale.

This was the petition of the minister and four of the church-wardens for the time being of the Dutch Reformed Church, Wynberg.

The petition set forth that the petitioners were the registered owners of certain piece of ground with the buildings thereon situate in Mowbray, as per deed of transfer dated 29th May, 1873.

That the deed of transfer contained the condition that the land and erection thereon should be used for religious purposes only, but that for some time past the Dutch Reformed Church had been unable to use the land and buildings for the purpose for which the same were given in consequence of there being no congregation in the vicinity, and that the buildings upon the property had become in a bad state of repair and were generally going to ruin.

That a short time ago application was made by the Committee of Management of the Mowbray Public School for the purchase of the land and buildings, whereupon a sale was concluded for the sum of £450 with the consent and approval of the Kerkraad at Wynberg subject to the sanction of the Court.

That the buildings were useless to the Church, and that it would be to the interest of the petitioners to dispose of them for the sum offered.

The prayer was that the Court might be pleased to grant an order authorising the Registrar of Deeds to pass transfer of the property to the Committee of Management for the time being of the Mowbray Public School.

The land in question was conveyed by the executors of the late Sybrand Jacobus Mostert, senior, in full and free property to the minister and church-wardens for the time being of the Dutch Reformed Church at Wynberg, their assigns and successors in office, subject to the condition *inter alia* . . . . that the said ground with the erections thereon shall be used for religious purposes only. . . . .

Mr. Buchanan moved.

The Court granted the authority as prayed, subject to an affidavit being filed with the Registrar of the Court to the effect that notice of the application had been given to the heirs of S. J. Mostert, senior.

[Petitioner's Attorney, Gus Trollip.]

SMITH V. SMITH. { 1896. Jan. 13th.

Mr. Close applied on behalf of the plaintiff for further direction as to the service of the process instituted by her against her husband for restitution of conjugal rights, failing which for divorce, it having been found impossible to effect personal service.

The Court granted the application, and ordered that one publication of citation be made in the London "Daily Telegraph," the return day to be extended until the first day of next term.

THE INCORPORATED LAW SOCIETY V. MILLIGAN. } 1896. Jan. 13th.

Circuit Court Attorney—Conviction on charge of theft—Suspension—Certificates—Notice to Law Society.

Where a Circuit Court attorney had been convicted on a charge of theft, the Court, on the application of the Law Society, suspended him from practice and directed that no application should be made for his reinstatement until three years had elapsed from the date of the Court's order, and then only after notice had been given to the Law Society.

The Court further directed the attorney to deliver his certificates to the Registrar.

This was an application on notice to the respondent calling upon him to show cause why his name should not be struck off from the roll of attorneys of the Circuit Courts of this colony by reason of his professional misconduct, in that he was on the 6th November last tried before the Resident Magis-

trate for Cape Town on a charge of theft by means of embezzlement, found guilty, and sentenced to six months' imprisonment with hard labour.

The President of the Law Society filed an affidavit setting forth the facts of the respondent's conviction on the 6th November last, on a charge of theft.

Mr. Searle, Q.C., appeared for the Law Society.

The respondent was not represented.

The Chief Justice: The Court will make the same order as in *Walker's case* (4 Sbeil, 397), that the respondent be suspended from practice, no application to be made for his reinstatement for three years. The certificates to be given up to the Registrar. Before the respondent applies to be reinstated he must give notice to the Law Society.

Mr. Justi e Buchanan concurred.

[Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

THE INCORPORATED LAW SOCIETY V. GARDNER. { 1896. Jan. 13th.

Attorney—Professional misconduct—Breach of trust—Satisfactory explanation—Law Society—Delay—Costs.

An attorney was called upon, at the instance of the Law Society, to show cause why he should not be struck off the rolls for having committed a breach of trust.

The alleged breach of trust consisted in the attorney's not paying over to the seller of a farm the balance of the purchase price.

In explanation the attorney stated that he had been instructed by the purchaser, his client, not to pay over the balance, as the farm was not of the extent represented by the seller.

The matter was brought to the notice of the Law Society in a letter addressed to that body by the Registrar of the High Court on 16th August, 1895, but no steps were taken against the attorney until four months afterwards.

The Court in accepting the attorney's explanation as satisfactory made no order as to costs

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This was an application on notice dated 16th December, 1895, to the respondent requiring him to show cause why he should not be struck off the roll of attorneys and notaries or otherwise punished by reason of his having been guilty of professional misconduct—in that he was instructed by one Antonie François Kock to collect from one Gabriel Johannes Marais the sum of £550, and having collected the said amount on 20th March, 1895, and paid part of it in satisfaction of a bond, due by Kock, he failed to pay the balance due to Kock, who obtained judgment against him for the said amount in the High Court of Griqualand West on the 15th August, 1895.

And why he should not pay the costs of the application.

The facts are briefly these:

Towards the end of 1894, Kock sold his undivided half-share in the farm "Weltevrede" in the division of Barkly West to Marais for £550. In payment Marais gave a promissory note in favour of Kock due on the 1st April 1895.

At the date of the sale there was a bond of £493 5s. 11d. on the farm in favour of the Master of the Supreme Court. Before transfer could be given, half of the bond had to be paid.

In February, 1895, Kock instructed the respondent to collect the promissory note, and pass transfer to Marais, at the same time sending the documents. The respondent undertook to carry out Kock's instructions. Marais paid the amount of the note. The respondent paid half of the bond, passed transfer to Marais, but did not pay the balance to Kock.

Kock then instituted an action against the respondent to recover the balance of the promissory note, and on the 15th August last, judgment was given against the respondent, who was in default, for the sum of £303 7s. 1d.

On the 16th August, the Registrar of the High Court, Griqualand West, wrote to the Law Society and forwarded the record, pointing out that it disclosed a serious breach of trust on the part of the respondent.

The respondent alleged, *inter alia*, that about the end of April Marais called on him and stated that Kock had deceived him as to the extent of the farm, it being only 2,100 morgen in extent, and not 3,000, as represented by Kock, and instructed him not to pay the balance of the purchase price.

That subsequently summons was issued against Marais and himself.

That after entering appearance, he advised Marais that the matter had better be settled, as on reference to the deed of sale of the farm, the extent was not mentioned but only the number of the farm.

That not having heard from Marais, he (respondent) delayed filing his plea, and judgment was given against him by default without

his knowledge. After judgment had been delivered, Marais called upon him, and agreed that it would be useless to fight the case on the shortfall of the ground in face of the deed of sale and power to transfer, and instructed him to pay Kook's attorneys the balance, which was accordingly paid. The respondent alleged that he had intended to re-open the case to show his *bona fides* in the matter, but was advised to wait and give his explanation afterwards as the matter had been reported to the Law Society.

That he had acted throughout for his client Marais, whose instructions he had carried out, and he trusted that the Court would accept his explanation, as he had acted *bona fide* in the matter.

No affidavit was filed by Marais nor were there any answering affidavits from the Law Society.

The Court intimated that in the absence of affidavits denying the respondent's version of the transaction his explanation appeared to be satisfactory.

Mr. Searle, Q.C., for the Law Society, on the question of costs: After the receipt of the Registrar's letter the Law Society was obliged to bring the matter to the notice of the Court, and as the respondent has only himself to blame he should certainly pay the costs, as he offered no explanation whatever to the Law Society.

Mr. Schreiner, Q.C., for the respondent: The Registrar's letter was written on the 16th August, and the notice of motion is dated 16th December, so that for four months the Law Society took no steps whatever in the matter, and the respondent might naturally conclude that the proceedings had dropped, and this would account for his offering no explanation to the Law Society.

The Chief Justice: We can only decide this case upon the information before the Court. If the statements made in the respondent's affidavit are true, and they are not denied, they are a complete answer to the charges brought against him. At the same time I am of opinion that the respondent should have furnished the information now before the Court to the Law Society. We are of opinion that there should be no order on this application, and no order as to costs.

[Law Society's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, A. H. McLeod.]

GLAESER'S EXECUTORS v. QUIN'S EXECUTORS. 1896. Jan. 13th.

Liquidation account—Amendment—Executors.

Where a woman's interest under her husband's will was sold in execution of a judgment obtained against her, and was purchased by the judgment creditor, and the husband's executors, in framing their account, debited the estate with an item of £25, being the amount of costs guaranteed by them, in their capacity, to the wife's attorneys to enable her to defend the action,

The Court refused to expunge the item, or to order an amendment of the account, on the grounds that the action was a proper one to be defended.

This was an application on notice to the respondents, calling upon them to show cause why the account submitted by them to the applicant under the order of this Honourable Court, dated 12th September, 1895, showing their dealings with all moneys received by them since 11th April, 1894, from the estate of the late William Quin, for and on behalf of Anna Maria Elizabeth Quin, whose rights had been acquired by the applicant, should not be amended:

(*a*) By altering the balance of £26 8s. 10d. (brought forward as being in hand on the 11th April, 1894) to £36 8s. 10d.

(*b*) By expunging the item of £25 deducted in the account from the share awarded to the applicant.

Or, why such other relief should not be given the applicant as to the Court might seem meet, and why they should not be ordered to pay the costs of the application *de bonis propriis*.

The facts are these:

On 12th September, 1895, the Court granted the applicant (then plaintiff) leave to enter judgment for an account from the respondents (then defendants) showing their dealings with all moneys received by them since 11th April, 1894, from the estate of the late Wm. Quin for and on behalf of Anna M. E. Quin (whose rights had been acquired by the applicant) and, failing an account within fourteen days, final judgment for the sum of £60, with costs *de bonis propriis* against the respondents (then defendants).

A copy of the order was served on the defendants on the 14th September, 1895, who thereafter duly paid the taxed costs up to the 12th September, 1895.

Correspondence then ensued between the attorneys on both sides, the applicant objecting *inter alia* to the following items in the account and claiming that it should be amended:

(*a*) By altering the balance of £26 8s. 10d. brought forward as being in hand on 11th April, 1894, to £36 8s. 10d., the difference of £10 being, as the applicant alleged, an amount wrongly charged to the estate of William Quin in the 11th Liquidation Account for part of law costs incurred in defending the case of the Estate of Glaeser against the widow Quin, and wherein judgment was given against her, and in execution of which judgment her interest in the estate of the late William Quin was sold and her rights acquired by the applicant.

(*b*) By expunging the item of £25 for costs paid under similar circumstances and deducted in the account from the share awarded to the applicant therein.

The respondents refused to amend the account, and the applicant alleged that the debiting of the £10 and £25 was illegal, wrongful, and unauthorised.

One of the respondents, George Quin, in his answering affidavit said, with reference to the item of £10, that this amount was paid by the executors to Mrs. Quin's attorneys long before the sale of her rights under the will of her late husband, William Quin, took place.

As to the £25, he alleged that in order to enable Mrs. Quin to defend the action instituted against her by the applicant in August, 1893, he (the deponent) on behalf of himself and his co-executors, on 12th August, 1893, guaranteed her attorneys the sum of £25, as they refused to act for her unless that amount were either paid or guaranteed to them.

That this sum was therefore a debt due by Mrs. Quin at the time of the sale of her rights, viz., on the 11th April, 1894.

Mr. Graham for the applicant: The item of £10 is not now questioned, but in respect of the £25 what practically amounted to a personal guarantee was given by the executors, and the amount should not have been brought up in the account.

Mr. Jones for the respondents: The applicant, as the purchaser of Mrs. Quin's inheritance, can be in no better position than she. The £25 was a debt due by her estate and was properly brought up in the account.

The application was refused with costs.

The Chief Justice said: No question now arises as to the first item of £10, as that amount was paid before Mrs. Quin's rights under her husband's will were attached and sold in execution. As to the £25, that amount was guaranteed by the executors to Mrs. Quin's attorneys to enable her to defend an action, which was most properly defended, seeing that the claim was for wines supplied to a lady who was addicted to intemperance. The application must be refused with costs.

[Applicants' Attorney, C. C. Silberbauer; Respondents' Attorneys, Messrs. Sauer & Standen.]

Ex parte FROST AND SOUTHEY. } 1896.
Re SOUTHEY'S WILL. } Jan. 13th.

Executors testamentary—Release from trust.

Where executors testamentary had completed their duties, as such, and were merely administering certain investments, the Court, at their request, relieved them from their trust, and appointed an administrator in their place on his finding security to the satisfaction of the Master.

This was the petition of the Hon. John Frost, C.M.G., and Charles Southey in their capacity as executors testamentary of the estate of the late John Henry Oliver Southey.

The petition set forth that the petitioners were the duly appointed executors testamentary of the estate of the deceased, as would appear from the letters of administration, granted to them on the 23rd May, 1876.

That they had duly carried out the testamentary dispositions of the deceased, and had filed with the Master due and proper accounts of their administration.

That the only assets in the estate were the following:

(*a*) A certain mortgage bond for the sum of £2,000 passed by Walter Southey in terms of the will of the deceased for the purchase price of the farm "Tender Gate," bequeathed to him in terms of the will.

(*b*) A certain mortgage bond for £700, also passed by the said Walter Southey upon the said property.

(*c*) A sum of £242 10s. deposited with the Bank of Africa at Queen's Town.

That the bonds constituted safe and ample security for the sums so invested and bear interest at 6 per cent. per annum, payable together with the interest on the bank deposit to the surviving spouse, Cornelia Emily Florence Southey, in terms of the will.

That the second-named petitioner was, by reason of his being engaged in farming and other operations, unable to continue to give

ADVOCATE LOUIS O. MILLER
EX LIBRIS
JOHANNESBURG

further attention to the collection of the interest and the payment thereof to the surviving spouse.

The first-named petitioner also alleged that owing to imperative demands on him he was also unable to attend to the affairs of the estate, and both the petitioners alleged that they were desirous of being relieved from the office of executors and administrators of the estate.

That Walter Southey was willing to accept the trust, and that the surviving spouse consented to the release of the petitioners and to the appointment of Walter Southey.

The prayer was that the Court would be pleased to grant the petitioners leave to resign their appointment as executors and administrators, and to relieve them from their trust, and to appoint Walter Southey in their place.

All the heirs consented to the application being granted.

Mr. Searle, Q.C., moved.

The Court relieved the petitioners from their executorship and appointed Walter Southey administrator on his finding security to the satisfaction of the Master in the sum of £2,000.

[Petitioners' Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

MAGISTRATES' CASES REVIEWED.

REGINA V. IZAACK TOMATO. { 1896. Feb. 1st.

The Chief Justice said: Among the cases which came before me as judge of the week, is the case, Queen against Izaack Tomato. The prisoner was charged before Mr. Van der Byl, Special Justice of the Peace, with the theft of stock. A preliminary examination was held, and the Attorney-General, in remitting the case to the Magistrate, directed his special attention to the 29th section of Act 8 of 1861. By that section it is provided that cases remitted by the Attorney-General to Courts of Resident Magistrates shall be proceeded with in such courts in like manner in all respects as if no preparatory examination had been previously taken in such cases, save and except that when the Resident Magistrate who shall try any such case shall be himself the person by or before whom the preparatory examination was taken, it shall not be imperative upon him to recall any witness who formerly gave his evidence in the presence of such magistrate and of the person accused, and it shall be competent and sufficient to read as evidence the deposition of such witness. But the trial took place, not before the Justice of the Peace who had taken the preparatory examination, but before Mr. Robertson, the Resident Magistrate of Beaufort West. He read over the evidence without recalling the witnesses, and upon that a conviction followed. It is quite clear that this conviction must be quashed. I regret to say that mistakes of this kind are rather on the increase. The accused was clearly guilty, but as the provisions of the Act have not been followed, the decision of the Magistrate cannot be upheld.

REGINA V. JOOSTE.

The Chief Justice (continuing) said: A similar mistake was made by another Magistrate in this case. The case was one in which certain farmers were charged with theft by means of false pretences. The evidence was taken before Mr. Van Reenen as Magistrate of Sutherland. The case was remitted by the Attorney-General, and special attention was again called to the 29th section of Act No. 3 of 1861, and another Magistrate read over the depositions, and did not re call the witnesses, and the prisoners were convicted. It is quite clear that a mistake has been made. In this case objection was taken on behalf of the prisoners, and made to the Magistrate trying the case, to the effect that the witnesses who had been examined should be recalled. The Magistrate appears to have thought that the Act 3 of 1861 had been altered by Act 1 of 1894. He was clearly mistaken, and the conviction must be quashed.

PROVISIONAL ROLL.

COLONIAL GOVERNMENT V. MCCAY. { 1896. Feb. 1st.

Mr. Giddy applied for provisional sentence upon a mortgage bond for £400, passed in favour of the Colonial Government and ceded to the defendant.

The Court granted provisional sentence, and ordered that the property be declared executable.

DROUET V. CLARK. { 1896. Feb. 1st.

Provisional Sentence—Bill of Exchange—Liquid Document—Consideration—Breach of Warranty.

A Bill of Exchange contained the words "value received in merchandise according to advice."

It was alleged that on arrival the goods proved not to be suitable nor in accordance with what had been warranted by the local agent of the consignor who had procured the order for the goods and who knew the purpose for which they were required; and that great loss had been occasioned to the defendant in consequence.

Held, *that the document was of a sufficiently liquid nature to entitle the plaintiff to provisional sentence, leaving it to the defendant to file his plea in the principal case, and to claim in reconvention for damages for any breach of warranty.*

This was an application for provisional sentence on the following bill of exchange:

Payable au cours du Paris a vue
Paris 17 *Avril* 1895.
R. P. F. 10.470.35.

A quatre vingt dix jours de vue veuillez payer contre ce mandat a l' ordre du Comptoir Nationale d' Escompte la somme de dix mille quatre cent soixante dix francs trente cinq cts (£415 9s. 6d.) *Valeur recue en merchandises suivant.*

(Signed) *G. Drouet.*

a Monsieur Clark.
Proprietaire du Royal Hotel,
Cape Town,
Colonie du Cap.

The bill was accepted by the defendant on 9th May, 1895, and was made payable at the Bank of Africa (Limited), Cape Town, on 7th August, 1895, but on the due date it was dishonoured. The defendant filed an affidavit in which he alleged *inter alia* that in January, 1895, he decided in order to complete the arrangements for his hotel business to have the building supplied throughout with hot water from the kitchen fires, and obtained from his architect specifications and plans which were submitted for tenders.

That in February, 1895, one J. le Roux, of 23, Castle-street, Cape Town, called upon him and suggested that he should order from the plaintiff certain stoves, cooking utensils, and other kitchen requisites, instead of carrying out the scheme formulated by the architect.

That accordingly he placed an order with plaintiff's firm and in due course received the goods, with some of which he was satisfied.

That at the time of their negotiations he took Le Roux over the building, which is of four stories, showed him the bathrooms and lavatories to which it was required that hot water should be supplied from the kitchen boiler, and he (defendant) also explained that he required a destructor in connection with the kitchen stoves for the purpose of burning all kitchen and other refuse.

That Le Roux undertook to supply him with a coal stove which he warranted to be of such a size and make as to contain a boiler sufficiently large to supply hot water throughout the hotel, and at the same time to act as a destructor. Moreover, he undertook to see it properly erected.

That upon the arrival of the stove, furnished by the plaintiff through Le Roux, it was duly erected but found to be wholly inadequate. After making several attempts to use it, and partially pulling down walls, readjusting piping, and making other experiments, suggested by Le Roux, it was found necessary to abandon the boiler portion of the stove, and to erect a separate furnace for the purpose of supplying hot water in the building and to act as a destructor.

That owing to the stove supplied by the plaintiff having failed to comply with the warranty and being even unfit for cooking purposes owing to a fault in the arrangement for carrying off the smoke, he had been compelled to employ skilled workmen and have radical alterations made at considerable expense.*

That he had suffered considerable damage by reason of the plaintiff's failure and breach of contract. For instance he had entered into an agreement with a hairdresser to let him a certain number of bath-rooms, at a rental of £15 a month, which contract he had been unable to fulfil and was threatened with an action for damages on account of the breach thereof. That he had supplied water-tanks and piping which were now useless, owing to the alteration of the scheme for circulating the hot water, and he had been compelled to pull down piping, which had been erected, to afford Le Roux an opportunity experimenting upon his stove.

* This expense, according to a statement annexed to the defendant's affidavit, amounted to £183 11s.

REP.

That as soon as the stove, as now altered, and the separate heating arrangements had been thoroughly tested, and he had ascertained the full amount for which he was liable by reason of the plaintiff's breach of contract, he would be in a position to make the plaintiff a tender for such balance as was due to him upon the bill now sued upon.

That the draft for which plaintiff claimed payment was accepted by him (defendant) upon the faith that the goods supplied would be according to contract, but in so far as the stove and heating arrangements were concerned he had a counter-claim against the plaintiff.

That with a view to an amicable arrangement he was prepared to pay the plaintiff £231 18s. 6d. in full settlement, but should this offer be declined he reserved all rights, and would be prepared to contest the plaintiff's claim and prove his counter-charges and claim in reconvention in the principal case.

Le Roux, the plaintiff's representative in Cape Town, in answer to the above denied that he had given the defendant any guarantee.

He attributed the failure of the stove to the fact that the opening to the chimney was only 8 inches by 6, instead of 16 inches by 12 as he had advised the defendant in a letter from Paris dated 15th March, 1895.

Mr. Juta, Q.C., for the plaintiff.

Mr. Schreiner, Q.C., for the defendant: The acceptance was against goods to arrive. Therefore the document is not liquid, for extrinsic evidence is required to show that the goods have been received, this not being apparent *ex facie* the document. Further, when they did arrive they were found not to comply with the representations and warranty and in consequence the defendant has suffered loss in the sum of £183. He is willing however to pay £231 18s. 6d. in full settlement.

There has clearly been a failure of consideration upon which the bill was accepted, and the plaintiff must therefore fall back upon the contract, when the defence can be properly raised. The condition stated in the bill has not been fulfilled. In any event the parties must go into the principal case. On the facts it is submitted that this is not a case for provisional sentence. He cited *Webster* v. *McKenzie* (1 Juta, 349).

The Chief Justice said: In my opinion the objection as to the liquidity of the bill cannot be sustained. The bill states that it was for value received, for merchandise according to advice. These words do not in any way destroy the liquidity of the bill itself. Then there is a further defence of failure of consideration. In my opinion the evidence does not establish that defence. If the evidence supports any defence at all, it is that there has been a breach of warranty, and for that the defendant can counter-claim. It is not by any means clear that there has been a breach of warranty. The most that can be said on the matter is that it is extremely doubtful. The onus in my opinion does not lie upon the plaintiff, but upon the defendant. Provisional sentence is granted for the plaintiff, but he will have to give security. Defendant can then file his defence and claim in reconvention for any damages which he may have sustained by any breach of warranty. Under all the circumstances we think that this is a case in which provisional sentence must be given with costs. Of course the costs will be recovered by the defendant if he succeeds in his case.

[Plaintiff's Attorney, W. E. Moore; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

MACKINTOSH V. BOTHA.

Mr. Buchanan applied for provisional sentence upon a promissory note for £150, and interest from January 7, 1896.

Granted.

FARRE V. CHARLTON. { 1896. Feb. 1st.

Mr. Buchanan applied for provisional sentence upon a mortgage bond for £400, less £34 18s. 6d. paid on account, and that the property specially hypothecated might be declared executable.

Granted.

HUGHES V. STENT.

Mr. Close applied for a decree of civil imprisonment upon an unsatisfied judgment for £16 13s. 10d. and interest.

Granted.

ILLIQUID ROLL.

ARNHOLZ AND CO. V. SMEER. { 1896. Feb. 1st.

Mr. Maskew applied for judgment for £29 18s. 3d., balance of account for goods sold and delivered, with interest, *à tempore moræ* and costs of suit.

Granted.

WYLLIE V. WELLS AND TURNER.

Mr. Close applied for judgment for £71 4s. 5d., with interest *à tempore moræ*, and that the landed property be declared executable, notice having been given in the summons.

Granted.

ADMISSION.—*Ex parte* NESER.

Mr. Sheil moved for the admission of Mr. Frederick Wilhelm Neser as a translator in the English and Dutch languages.

The admission was ordered, and the oath allowed to be taken before the R.M., Philip's Town.

REHABILITATION.—*Ex parte* THOMPSON.

On motion from the Bar, William Thompson received his rehabilitation.

GENERAL MOTIONS.

POPPE V. BATE AND CO. { 1896. Feb. 1st.

Mr. Graham, on behalf of the defendant, applied for an order postponing the trial of the suit between the parties from the 5th of February to the 1st May next, by reason of the absence in the Free State on professional business of Mr. Harcombe, an engineer, a most material witness for the defence.

Mr. Juta, Q.C., opposed the application on the ground of the great inconvenience that would be caused by a postponement.

The Chief Justice said: The Court must refuse to make the order, but if at the trial it appears that it was utterly impossible for the witness to be present application may be made for postponement until a future date. The defendant being unsuccessful must pay the costs.

BAART V. BAART.

This was an action for divorce on the grounds of the defendant's adultery with one Mitchell.

Mr. Graham for plaintiff.

Defendant in default.

Lion Baart, a carpenter, residing at Wellington, said he was married on the 14th July, 1886, at Flushing. His wife's maiden name was Cornelia Christine Uyt. He came to the Colony in 1890. A girl was the issue of the marriage, and would be seven years old next March. The parties lived in the Transvaal before living in Wellington. They lived together in Orange-street, Cape Town, in 1892. He last saw his wife in the beginning of June of that year. She then left him, and a fortnight later he found she was living in Loop-street with a man named Mitchell. He twice saw Mitchell and his wife together, once on the Parade and once on the Jetty. A month later witness visited Mitchell's house to see his daughter, but Mitchell would not let him see her. He claimed the custody of his child, who was at present with her mother. He did not know where his wife was living. About six months ago he had a letter from her to the effect that she was living at Zanzibar. Since then he had not heard of her. Witness heard that Mitchell was living with his wife at Zanzibar. His wife was born at Middelburg. The parties were married by ante-nuptial contract, which was not registered in this colony.

Mrs. Agnes Brown, residing at 85, Hanover-street, said she lived at that address in 1892. A lady and gentleman then took rooms at witness's address. The gentleman gave the name of Mitchell, and said that the lady living with him was his wife. They lived together as man and wife for six months. Witness gave them notice to leave at the expiry of that period as she learned that defendant was not the wife of Mitchell, but of Baart. Just before they left the house Baart came and claimed the child, stating that he was defendant's husband, but the defendant declined to see him or give up the child.

Matilda Augusta Herbig said she knew Baart and his wife. They took rooms with witness's mother in Orange-street, Cape Town, in 1892, and lived there during four months. Subsequently they went to live in Caledon-street. In June, 1892, defendant was living at Mrs. Brown's house, as Mrs. Mitchell. Mrs. Baart took her child away in December, 1892. As far as witness knew, Baart treated his wife properly.

The Court granted a decree of divorce, and gave the plaintiff the custody of the child of the marriage.

[Plaintiff's Attorneys, Fairbridge, Arderne & Lawton.]

WELCH V. WELCH. { 1896. Feb. 1st.

This was an action for divorce on the grounds of the defendant's adultery.

Mr. Graham for plaintiff.

Defendant in default.

Norman Lacy, clerk in charge of the marriage register at the Colonial Office, proved the marriage.

Mary Jane Eleanor Welch, the plaintiff, said she now carried on business as a boarding-house keeper at 8, Somerset-road. She was formerly married to one A. P. Sleigh, and on March 13, 1893, she was married to the defendant. After their marriage they lived together at a boarding-house in Bree-street, residing there about six weeks. They then took a house at Observatory-road, where they lived happily until September, 1893. Unpleasantness then ensued, as defendant did not bring any money home, and witness had to sell her jewellery to provide herself with funds. Owing to his cruelty, witness and

defendant executed a deed of separation in October, 1895. There were no children of the marriage. Witness identified her husband's signature in the marriage register, and also the photograph produced. The parties were married under an ante-nuptial contract. Defendant insured his life, but after paying the premium he allowed it to lapse.

Minnie Losper, a coloured prostitute, proved the adultery of defendant with her in November last. He gave the name of Williamson, but she subsequently heard him addressed as Welch. She identified the photograph produced as that of defendant.

Jessie Bennett, a coloured prostitute, corroborated.

Wm. Hill, a private detective, gave evidence as to seeing defendant enter a house of ill-fame in November last.

The Chief Justice said: There is some suspicion in this case, the evidence consisting of that of a photograph, a prostitute, and a detective. If there had not been personal service, the Court would have hesitated to grant a decree, on the evidence given to-day, but that evidence being coupled with the fact that there has been personal service upon the defendant, and that he is not here, the Court feels justified in granting a decree.

[Plaintiff's Attorney, C. C. Silberbauer.]

DEARHAM v. DEARHAM. { 1896. Feb. 1st.

Mr. Close applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order for restitution to her husband of his conjugal rights.

Granted.

[Plaintiff's Attorneys, Reitz & Herold.]

THE COLONIAL GOVERNMENT v. TAYLOR AND SYMONS.

Mr. Giddy applied for the attachment *ad fundandam jurisdictionem* of this Court of certain landed property, consisting of farms in the district of Maclear, in an action about to be instituted by edictal citation for the recovery of a sum of money due for quitrent and stamp duty on twenty-three farms.

The Court granted the order, making the same returnable on the 20th instant; personal service if possible.

THE PETITION OF GILIAM J. J. VAN NIEKERK.

Mr. Close applied for leave to sue *in forma pauperis* in an action against Marks Fleischer for the recovery of the balance of an amount due for services rendered on trading expeditions.

Granted.

COLONIAL GOVERNMENT v. OPPERMAN.

Mr. Giddy applied for leave to sue by edictal citation in an action about to be instituted against the respondent for specific performance of certain contract respecting the purchase by him of two farms in the district of Kenhardt, or otherwise for the cancellation of the sale.

The Court granted the order, and directed that one insertion of the same be made in the "Government Gazette," that a prepaid letter be posted to the defendant at Lake Ngami apprising him of the order, and that a copy of the "Gazette" be also forwarded to him.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP,]

FURNIVALL v. FURNIVALL. { 1896. Feb. 3rd.

This was an action for judicial separation instituted by the plaintiff against her husband on the grounds of his cruelty and ill-treatment.

Mr. McGregor for the plaintiff; the defendant appeared in person.

Mrs. Sydney Furnivall said she was formerly married to George Thomas Cornwall, who died in 1888. She was married to the defendant in June, 1894, by ante-nuptial contract. She had property when she married defendant, who was an engineer. He gave up business in November of the same year. They did not live happily together. Defendant would not work, and wanted her to keep him, which she would not do. They lived at Green Point from June to December, after which he left for England. While defendant lived with her he ill-treated witness. On one occasion, without the slightest provocation, defendant maliciously upset a tureen of soup over witness. Defendant was of intemperate habits. He returned from England in July, 1895, after which the parties never lived upon friendly terms. Defendant on one occasion jumped up as witness was leaving the room and kicked her in the back, by reason

of which she could not move for five minutes. This affair happened about five weeks after the birth of her child, when witness was in very bad health. Defendant used dreadful language towards witness, no occasion for such language having been given. He frequently declined to allow her to leave the room. The child of the marriage, a boy, was born in July, 1895. The baby was very delicate, and defendant frequently awoke it from its sleep in order to induce witness to enter the room for the purpose of abusing her. In August, 1895, defendant said he would take the child to England, and took it on board a vessel in the Docks. Witness eventually recovered it from the captain, as there were no means of feeding the child on board It was then seven weeks old. After defendant's return from England, he was never quite sober. When he took the child on board the ship he was extremely intoxicated. He did not then go to England, but left for Johannesburg. Witness did not know where he had gone at the time. At a later date she received a letter (produced) from defendant in Johannesburg, inviting her to live with him at Johannesburg on the understanding that plaintiff's four children by the former marriage, aged respectively seventeen, sixteen, fifteen, and eight, should remain in Cape Town, as they had all along been the cause of "the unhappiness." He did not feel inclined to advance their expenses, as they had never treated him as a father. Three of those children lived at a boarding-school. Plaintiff replied to the letter by declining to join defendant on the ground that she could not leave Green Point owing to the delicate health of the child of the marriage, and the necessity for the children of the first marriage residing with the parties. Defendant replied to this letter by informing plaintiff that if she did not join him at once, he would take legal proceedings. On December 20, 1895, defendant returned to the home at Green Point, and two days later he pushed her off a chair at the dinner-table, as a consequence of which she fell heavily on the floor. He pushed her down because she was sitting in his chair. He was very abusive to her, and declined to leave the house. On one occasion he carried the child out into the garden while he (defendant) was extremely intoxicated. The child was then about six months old, and was exposed to the cold air during about half an hour Yesterday defendant locked witness out of her bedroom during two hours. He kept the child away from her all the time, and subsequently threatened to smash witness's face. Last night defendant told her that he was going to defend the present action in person. He slept at the Green Point residence. For some time past defendant's behaviour had been of such a nature as to make plaintiff's married life unbearable, and at one time to endanger the health of the child. Since the marriage he had not contributed to plaintiff's support.

Norman Lacy, a clerk in the Colonial Office, entrusted with the charge of the marriage register, proved the marriage.

At this stage the defendant came forward, and the plaintiff was recalled for cross-examination.

Cross-examined by defendant: She would swear that she had never given defendant permission to take the child to England. She had never heard her mother say that she (plaintiff) had said that she wanted to get rid of the child. Plaintiff had offered to take the child to England as its nurse, but not as the wife of defendant. It was not true that on one occasion at Muizenberg she went down on her knees and asked God to strike defendant dead. It was not true that threw an inkpot at him, nor was it true that she threatened to throw a leg of mutton at him. He had never given her £5 towards her support. She had never struck defendant in the face, or scratched his forehead. She had not struck defendant in the face in the presence of a sergeant of the Sea Point Police. Defendant had not asked a police-sergeant to protect him from plaintiff and two other ladies.

At this stage the Chief Justice suggested to the defendant that it was apparent that the parties could not live happily together, and asked defendant if he would consent to a separation order being made.

Defendant said he could get on very well with the plaintiff if it were not for her temper. He was very fond of her. But he would rather be divorced than be separated from his wife by a judicial order.

Plaintiff re-examined: She wished to have the custody of the child of the marriage. Defendant had offered to leave her and go to England if she would settle £200 a year on him.

By the Court: Her income amounted to about £800 a year.

George Cornwall, 16, a son of the plaintiff by the former marriage, corroborated.

Cross-examined by defendant: Witness called defendant a "—— cad" when he pushed witness's mother off a chair. He had also told defendant that he was not his (witness's) father.

Lucy Cornwall, a daughter of plaintiff by the first marriage, also corroborated.

By the Court: She had never heard her mother use improper language towards defendant,

Cross-examined by defendant: Plaintiff might have threatened defendant that she would throw a leg of mutton at defendant on one occasion.

Sarah Miller, a nurse in the employ of plaintiff, said that last night defendant called his wife a low, fat prostitute.

Cross-examined by defendant: Last night defendant threatened to blacken plaintiff's eyes.

Maria Kleyn, a cook in the employ of the plaintiff, gave corroborative testimony.

Mr. McGregor, on behalf of the plaintiff, now applied for the granting of a decree of summary ejectment against defendant.

At defendant's request a further letter from defendant to plaintiff was read, which was to the effect that plaintiff could live with defendant in Johannesburg, and bring her children with her, if he could be master of the household.

Defendant went into the box and denied that he had ever kicked his wife. On one occasion she threw a bracelet in his face, and spat upon him. He had never ill-treated her, and he was not of intemperate habits. On one occasion he seized her by the wrists and implored her to be friends. When he took the child on board a steamer (the Gaul) bound for England, she knew that he had engaged a nurse. He had grounds for calling her a foul name. He had not taken steps to procure witnesses, because he had not thought that his wife would press the case. He had not pushed his wife from a chair; she fell down accidentally. On one occasion, while witness was lying half asleep in bed, she threw a jug of shaving water in his face. Her children set him at defiance.

Cross-examined; He worked in Johannesburg as an engineer for Mr. J. B. Robinson during about three months, and earned a salary of from £25 to £35 a month. He broke off a partnership with one Perrott partly upon the advice of his wife and partly because he was desirous of starting business on his own account. He left for Johannesburg with the object of establishing a home there, as owing to the plaintiff being led away by a number of her lady friends, witness could get no peace. He proposed to take the child to England because his wife did not seem to care for the child. She did not neglect it exactly, but she used to leave it in the house while she was absent at the theatre during the evening. He had been intoxicated on one occasion only. Yesterday he might have told his wife that he would be present in court to-day. He thought that he could not appear personally, and he had no means to employ counsel, consequently he had brought no witnesses. He would like the case postponed for evidence for the defence,

By the Court: He did not tell plaintiff on Saturday that he had heard that the case was in the paper.

After argument as to whether the case should be postponed,

The Chief Justice said: I do not think that the case ought to be postponed. The defendant is a man of fair intelligence. He had an interview in the first instance with his attorney, who surely would have told him that he could appear in person, and would be justified in calling any witnesses whom he chose to call for the defence. I am satisfied that he knew of that, and if he did not know of it he ought to have known of it. Upon the evidence before the Court three facts have been clearly established. One fact is that the defendant was intemperate in his habits on many occasions; another fact clearly established is that he used most offensive language towards his wife on two occasions, at least; and the third fact clearly established is that on one occasion, while his family were at dinner, he in a very rough manner pushed the plaintiff off a chair, and caused her to fall upon the ground. That is clearly established; in fact, it is admitted. What the wife did afterwards, when the leg of mutton was handled, shows that she has a temper of her own, but the provocation complained of on the part of the defendant is not such as would justify him in treating his wife with such roughness—I might almost say brutality—in the presence of her own children. She also deposes to an assault of a very serious nature made upon her by the defendant, that he gave her a very severe kick in the back, from which she suffered for several months afterwards, and that this kick was given shortly after she was delivered of a child by him. Well, if that be true, I have no doubt that the Court should grant a decree, and the witnesses whom he suggests should be called for the defence would not assist us very much upon this question of credibility, except so far as this, that if the wife is mistaken as to what occurred in the presence of the policeman, it would consequently throw discredit upon her credibility in regard to the kicking incident. Therefore, upon the whole, perhaps it would be better to leave this kicking incident out altogether. Without that there is sufficient evidence to show that the treatment of the plaintiff by the defendant is such as to render further cohabitation insufferable. She cannot be expected after the treatment she has received in the presence of her own children and domestics from the defendant, and after his habitual intemperance, to live happily with him. At the same time I think there have been faults of temper also on the part of the plaintiff

but not sufficient to deprive her of her right to a decree of judicial separation. But there will be no costs. The Court will grant a decree of separation, and give the plaintiff the custody of the child until it reaches the age of twelve years. Then the defendant will be at liberty to apply again for the custody of the child, and in the meantime the defendant is to have access to the child at all reasonable times and places.

Mr. Justice Buchanan: I concur in this judgment. I think that the plaintiff has clearly a right to a decree of judicial separation. Upon the evidence given in this case it would be worse than wrong, I think, to compel the parties to live together. As to the custody of the child. I think that the plaintiff is certainly entitled to the custody of it in the interests of the child itself. The intemperate habits of the father and his want of means induce me to say that the mother is the proper person to have the custody of the child, as she has to find the means to maintain the household.

Mr. Justice Maasdorp: I concur.

The Chief Justice: I think that as the defendant has no means, and the plaintiff is possessed of a considerable income, I would suggest now that the plaintiff should pay the defendant something to leave the premises forthwith. Is she prepared to pay him something, Mr. McGregor? This is entirely my own suggestion. The defendant could then leave at once.

Mr. McGregor: My client is not ready to pay now, but she will do something ——

The Chief Justice: Then I do not think that we can make any further order. I should have thought that the plaintiff, with an income of £700 a year, would have been glad to pay the defendant £40 or £50 down in order to be able to say to him, "Leave the house at once." If she will not do that, we can make no further order. I suggested it merely for the sake of peace.

Mr. McGregor asked the Court to accept an instalment down from plaintiff to defendant, the remainder to be paid over at a later date to be fixed by the Court. The plaintiff had not sufficient ready money at present.

Mr. Justice Buchanan: I would suggest that it would be sufficient to give him enough to let him go to Johannesburg.

The Chief Justice: Give him £25. Then we can make it part of the order that defendant leaves the house forthwith.

Defendant: I do not intend going to Johannesburg.

Mr. McGregor: The plaintiff cannot pay it all forthwith.

The Chief Justice: Then the Court will make an order as to the defendant leaving the house, but simply grant a decree for judicial separation. Of course if he will not leave the house you will have to proceed further.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne, & Lawton.]

GENERAL MOTIONS.

PEACH AND CO. v. SIMONS' TRUSTEE AND THE MASTER. } 1896. Feb. 4th.

Promissory note—General bond—Security—Prescription.

Where a general bond has been passed to secure the amount of a promissory note on condition that the bond should become null and void on payment of such amount, the fact that such promissory note as such has become prescribed is not equivalent to payment and therefore does not render the bond null and void.

At the time when the bond was passed the insolvent was domiciled in Griqualand West and the bond was there registered in terms of section 29 of Act 4 of 1874, but he afterwards became domiciled in the colony proper where his estate was sequestrated as insolvent.

Held, *that the bond was entitled to the benefit of the proviso of the 10th section of the Prescription Amendment Act, 1861, and that, although more than eight years had elapsed since its passing, the creditor was entitled to prove his debt against the insolvent estate.*

Held further, *that preference in respect of such bond extended only to assets in Griqualand West.*

This was an application on notice calling upon the respondents to show cause why the proofs of debt annexed, or one or other of them, which were tendered to the Master on behalf of the applicants on 20th December, 1895, should not be accepted by the Master, the said claims having been illegally rejected, and also to show cause why the costs of the application should not be paid out of the funds of the insolvent estate.

The proof of debt was on a promissory note for £201 8s. 4d., dated 29th June, 1886, and due on 29th August, 1886, with interest at 6 per cent. from the due date (eight years and ten months) amounting to £40 11s. 11d., less £121 0s. 9d. paid on account, leaving a balance of £121,

The debt was secured by a general bond for £300 executed at Kimberley on the 29th September, 1884, and duly registered in the Deeds Registry, Kimberley.

The applicant's attorney filed an affidavit in which he alleged that acting on instructions from the applicants he presented the proof of debt, promissory note, account and general bond at a special meeting of the insolvent estate on 1st November, 1895. That exception was taken by the trustee to the claim on the ground that the promissory note had been prescribed to which it was urged in reply that the account and bond were annexed to the proof and that while the bond was in force the claim could not become prescribed and that it should be accepted by the Master, and that the trustee could, if he thought fit, decline to make any award in respect of the claim.

The Master upheld the exception and rejected the claim. That thereafter a further proof of debt was tendered to the Master at a special meeting held on 20th December, 1895, and was also rejected by the Master.

The second proof tendered was for the sum of £80 8s. 1d., being the balance shown as due on the account less the interest. On this claim the Acting Master made the following endorsement: "On this claim being tendered the trustee, Mr. G. W. Steytler, excepted to its admission on the ground that the bond is only to secure a preference on a running account or promissory notes, and can therefore only be mentioned in connection with the above debt as security for the same and not as the principal debt. Exception allowed and claim rejected." The trustee, Mr. G. W. Steytler, deposed that the insolvent, Simons, was no longer in the Cape Colony, having left for Johannesburg, and being unacquainted with his address the trustee was unable to obtain an affidavit from him.

That from inquiries which he had instituted at Kimberley, he had been informed that Simons' estate was assigned there in March, 1893, for the benefit of his creditors.

That he had been informed by the insolvent and verily believed that the items appearing as cash credits represented the proceeds of certain produce and articles handed over to Peach & Co. for realisation on behalf of the insolvent.

That if the claim of the applicants was to be admitted then the deponent said that no preference should be awarded therefor upon the assets of the estate situate elsewhere than in Kimberley.

That there were no assets belonging to the estate at Kimberley, all the insolvent's property having been handed over in terms of the deed of assignment and realised in due course.

That in 1894 Simons and his family left Kimberley and settled in Cape Town, where a fresh domicile and estate were acquired and their Kimberley abode abandoned.

Mr. Searle, Q.C., for applicant.

Mr Benjamin for the respondent.

De Villiers, C.J.: If there had been no bond in question at all, I should by no means have been prepared to hold that the promissory note proved by the applicants upon the insolvent estate has been prescribed. There is a fair amount of evidence to prove such a part payment of the debt within the period of prescription, as would take the applicant's cause of action out of the operation of the Act No. 6 of 1861. But the applicants' right to prove their debt is fortified by the bond whereby the insolvent, after renouncing the usual exceptions, acknowledged himself to be indebted to the applicants in the amount of the note. Upon that bond the applicants' would have been entitled to provisional sentence against the insolvent before insolvency in the absence of proof that the debt had been paid. Such is clearly the effect of the decision in *De Waal and De Kock* v. *Van Zyl* (3 Juta, 188). The 2nd section of Act 6 of 1861, after enacting that no action upon a liquid document shall be capable of being brought after eight years from the accrual of the cause of action, provides that this enactment shall not apply to any mortgage bond, general or special. The bond in question is a general bond and can only be prescribed in thirty years; but then it is said that as the bond was passed only as a security for the promissory note, the prescription of eight years ought to apply. This argument would be perfectly valid, if the effect of the prescription were equivalent to that of payment. The effect of prescription, however, is to prevent an action being brought on the promissory note. The condition of the bond is that on payment of the amount secured, the bond shall become null and void, and therefore until payment or its equivalent, the bond remains in force as a substantial security. The fact that the bond is only registered in the Registry of Deeds of Griqualand West does not assist the defendant upon the question whether it is a bond or not in terms of the Prescription Act. It was so registered at the time when the insolvent was still domiciled in Griqualand West in terms of the 29th section of Act No. 39 of 1877. It would appear that at the date of his insolvency the insolvent had ceased to be domiciled in Griqualand West. His change of domicile, however, could not affect the nature of the registered

instrument, which continued to be a bond. To what extent it would affect assets in and out of Griqualand West need not now be discussed. The question of preference will have to be decided by the Master, but the only question how submitted to the Court is whether the bond ought to be admitted to proof at all. That question must be decided in the affirmative, and the costs of this application must be ordered to come out of the estate.

Postea.

De Villiers, C.J.: The applicants' bond having been admitted to proof the Master was called upon to decide to what extent preference should be awarded thereon, and he has decided that only assets in Griqualand West, where the bond was registered, should be subject to such preference. The registration took place while the debtor was domiciled in Griqualand West but he subsequently became domiciled in the colony proper, where his estate was sequestrated as insolvent. The creditors have appealed to the Court against the Master's decision. The 29th section of the Griqualand West Annexation Act, 1877, enacts that "the Deeds Registry of the said Province shall, in regard to that part of the Colony formed by such annexation, remain and be of the same force and effect after such annexation as before such annexation." Before annexation the registration in the Province of a general bond could have no effect on the assets situate elsewhere of a debtor who has become domiciled and then insolvent in another country. The assignment by operation of the insolvency law of his domicile at the date of insolvency would operate as an assignment of his movable property wherever situate and it is only by virtue of the hypothecary rights acquired within the Province that the bond creditor could prevent the full operation of such assignment. In *Howse's* case (3 J. 14), the right of a creditor with hypothecary rights to make those rights effectual by an action in the courts of the country where they had been acquired was fully recognised. But neither in that case nor in the cases there cited was it suggested that assets situate in the country where the debtor's estate had been sequestrated could be subjected to the hypothec. The rules of law of that country for the distribution of the insolvent's assets would regulate the distribution of all assets found there. The fact that the Province has been annexed to the Colony does not confer on the applicants greater rights than they would have possessed without such annexation, and the 29th section of the Act expressly provides that the Deeds Registry shall remain of the same force and effect after as before annexation. The Master by awarding preference in respect of assets within Griqualand West gave full force and effect to the registration of the bond, but he could not consistently with the rights acquired by creditors under a sequestration in the colony proper award preference in respect of assets outside Griqualand West. The appeal must therefore be dismissed with costs.

Their lordships concurred.

Mr. Searle applied for costs to be allowed out of the estate.

The Court granted the application.

[Applicants' Attorney, Gus Trollip; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

CROKER V. CROKER. } 1896. Feb. 3rd.

Judicial separation—Deed—Rule of Court.

Where husband and wife had executed a notarial deed of separation a mensa et thoro, *the Court, on the application of the wife, refused to make the deed a rule of Court.*

This was an application, by Rosa Maria Croker, calling upon her husband, William Croker, to show cause why the deed of separation entered into between them on the 14th January, 1895, should not be made a rule of Court.

The applicant in her affidavit alleged that she was married in community to the respondent.

That owing to unhappy differences having arisen between them, due to incompatibility of temper and other causes, they had mutually agreed to live apart.

That on the 10th and 14th days of January last they executed a deed of separation, whereby they agreed to live apart from each other, and to separate themselves from bed, board, cohabitation, community of goods and of profit and loss.

That the deed of separation provided that either party to it might apply to the Supreme Court to have the same made a rule of Court.

Mr. Tredgold moved.

The respondent appeared in person to oppose but he was not heard.

The Court refused to entertain the application.

[Petitioner's Attorneys, Messrs. Fairbridge Arderne & Lawton.]

THE UNION BANK OF CAPE TOWN.

Mr. Schreiner, Q.C., applied for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with debtors of the bank.

The following were the compromises: Evans, Erridge & Co., debtors in bills discounted to the extent originally of £1,822 10s., but since reduced, and now standing at £551 19s. 5d, offer £50 in full settlement of their liability, at the same time surrendering all securities held by the liquidators, who retain their rights against other parties to the bills. The amount offered has been deposited.

Edward Sheppard, debtor on bills discounted, and bills held as collateral security, to the extent of £480, offers £50 in full settlement of his liability, at the same time surrendering any securities held by the liquidators, who retain their rights against other parties to the bills. The amount offered has been deposited.

The Court sanctioned the compromises.

THE PETITION OF FRANK HAYWARD.

Mr. McLachlan applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of certain two lots of ground, situate along the upper main road from Cape Town to Wynberg, purchased by him from the estate of the late Maria Carlsen but never transferred.

Granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

WILTSHIRE V. WILTSHIRE. { 1896. Feb. 4th.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of the defendant's malicious desertion.

The intendit alleged that the parties were married in 1885, and that the desertion took place in 1891.

Mr. Graham for plaintiff, defendant in default.

Evidence of the marriage and desertion having been given, the Court granted a decree of restitution with costs.

The Chief Justice said: The Court will grant a decree for restitution of conjugal rights, with costs, defendant to return to or receive plaintiff on or before the 1st of April next, failing which we grant a rule *nisi* calling upon defendant to show cause, on the 1st of May, why a decree of divorce should not be granted with costs, and the plaintiff be declared entitled to the custody of the child of the marriage. The rule to be published once in the "Government Gazette," and a copy of the same to be sent by post, prepaid, to the defendant's mother, addressed to Colne, Lancashire.

BEATTIE V. CONRADIE.

This was an appeal from a judgment of the Resident Magistrate of Sutherland in an interpleader suit in which the present appellant claimed certain movable property which had been attached by the messenger of the Court in execution of a judgment, which with costs amounted to £60 odd, obtained by the present respondent against one Botma.

On the 3rd December last the following articles were attached under the writ: 399 sheep and goats, two rams, twelve donkeys, two horses, one wagon, and harness for ten donkeys, trek chain and yokes complete, two rifles, one saddle and bridle, seventeen sheepskins, one wagon-jack and whip.

On the 7th December, the appellant, who is Botma's stepson and twenty-two years of age claimed as his property about 150 sheep and goats, one horse, one wagon, and harness for ten donkeys complete, ten donkeys, one rifle, one wagon-jack and whip. He at the same time stated that about fifty sheep belonged to the other children.

A written contract was put in dated 25th January, 1891, under which the claimant purported to have bought from his stepfather a wagon and six donkeys for £30. On the back of the contract were indorsed the various payments, the last being dated 6th March, 1895.

As to the sheep claimed by the appellant they were alleged to be the increase, on the ten lambs given to him by his stepfather, together with fifty ewes given to him by a Mr. Caldo, for whom he stated that he had worked.

The extra four donkeys claimed by him were alleged to be the progeny of the donkeys bought from Botma. That the horse was one given to him by Botma in lieu of a horse of his which had died in Botma's service, and that the rifle claimed was one bought by him from a Mr. Hoogveld.

The claimed admitted that his and his stepfather's sheep ran together, but alleged that they bore different marks, his being left ear swallow tail right ear half moon behind; his father's being two swallow tails.

Two ears, alleged to have been cut off of one of the appellant's sheep, were put in in the Court below and attached to the record.

The Magistrate gave judgment against the claimant, and declared the property executable with costs.

The following were his reasons: The claimant in this case did not establish his claim to my satisfaction. His evidence throughout was very unreliable, he told the Court a deliberate falsehood by stating that he was engaged by one Thomas Caldo as a servant. The same Caldo, who is a farmer, bearing a very high character in this district, stated in his evidence that the claimant was never in his service nor ever engaged by him.

According to the evidence I am firmly convinced that the contract put in was made with the object of defrauding Conradie out of his money, as the contract was dated at the same time as the money was demanded from Botma. I would point out that the contract is not properly stamped. The man Botma, from whom the claimant is alleged to have purchased all the movables, (although in court), was not put in the witness box to confirm the claimant's evidence which is a very curious fact. I believe there are sheep bearing Beattie's mark, but these sheep are the progeny of the fifty ewes given by Caldo to Botma for services rendered, as borne out by evidence. Caldo gave his evidence in a very straightforward manner, and I believe every word he said, whereas on the other hand I did not believe Beattie and his witnesses at all.

From this judgment Beattie now appealed.

Mr. Searle, Q.C., was heard in support of the appeal.

Mr. Schreiner, Q.C., for the respondent.

The Court dismissed the appeal.

The Chief Justice said: The Court is quite satisfied that the wagon, sheep, and gear belong to Botma and not to Beattie, the claimant. A document was put in purporting to be a contract executed as far back as 1891, under which the appellant, who was then about seventeen or eighteen, purchased these articles from his stepfather, payment to be made in instalments. But the stepfather was to retain possession of the articles, and it appears now that the wagon which was found in the possession of the stepfather is not the wagon which was sold to the son; but that it is another wagon which the father himself had exchanged for the one which he is supposed to have sold to the son. There is also the evidence deposed to by Caldo, who on both sides is admitted to be a credible witness, which is to the effect that the mother of the appellant had been coaching him as to the manner in which he was to give evidence in regard to the wagon and the gear. Of course, if the appellant's evidence is not credited upon these items, I think that at all events it is a fact which throws discredit upon the rest of the evidence given by him. It is really a question of credibility. The Magistrate, with all the evidence before him, came to the conclusion that the plaintiff's evidence was not to be believed, and that the evidence given on behalf of the respondent is the trustworthy evidence in the case. It is a remarkable circumstance that at the time the sheep were attached and taken out of possession of the appellant, he did not at once remonstrate with the messenger about taking those sheep. Certain ears were produced, but we have no evidence whatever as to what sheep these ears belonged to. Judging from the two specimens here, it is not clear that they belonged to the same sheep, and it is quite possible that there may have been a couple of sheep bearing the remarks. But what the appellant had to do was to satisfy the Magistrate that each of the sheep that he claimed was his. At all events so much was required of him under the special circumstances of this case. The *onus probandi* clearly lay upon the appellant to prove to the satisfaction of the Magistrate that every one of the sheep claimed by him actually belonged to him. Upon the whole therefore, even in regard to these sheep, upon which there might possibly have been a doubt, I do not think that the appellant in this case has satisfied the onus which under all the circumstances lay upon him of proving that these sheep belonged to him. As to the rifle, I think it is pretty clear from the evidence that the rifle was handed up to the appellant during the hearing of the case, and I do not understand the Magistrate's judgment to disagree on that point. It might be made perfectly clear in the judgment that the rifle at all events is to be handed up. But that circumstance, in my opinion, ought not to affect the question of costs, because I am perfectly satisfied that if the appellant had informed the other side that he was prepared to withdraw the appeal if the rifle were handed up to him, that it would have been handed up immediately. According to the evidence, Mr. Van Eyk was quite prepared to hand up the rifle.

Mr. Searle: But as to the costs in the Court below, my lord?

The Chief Justice: It is clear that the appellant would not have been entitled to costs in the Court below, because there the respondent succeeded upon all the items except the rifle.

Mr. Searle pointed out that the value of the rifle was £6 10s.

The Chief Justice: Still, the respondent succeeded upon every item except the rifle. There

is another circumstance one cannot help commenting upon, and that is the fact that Botma was not called as a witness. Botma is a man who could have thrown more light upon the whole of this case than any other witness. He is not called to confirm the statements made by his stepson as to the ownership of articles attached. More goods appear to have been attached than was necessary for the purpose of satisfying so small a debt. But that is a question which cannot affect the respondent in this case. At the same time, I am bound to comment upon the fact that in many of these cases messengers of the Court are in the habit of attaching far more property than they ought to. Dressed in a little authority for a time, they seem to be perfectly unable to exercise any discretion at all in such a matter. In this case the messenger seised all the cattle, a wagon, and gear for the purpose of satisfying a small debt of £30, which had been increased by costs to £60, one of the largest items of which was upon this excessive attachment. At the same time, as I have said, this cannot affect our judgment. The appeal must, therefore, be dismissed with costs, and it is understood with regard to the rifle that it is to be handed over to the appellant.

Their lordship concurred.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

POPPE V. BATE AND CO. — 1896. Feb. 5th., 6th., 7th.

Conveyance of goods—Carrier's liability—Negligence of bailor—Injury in transit—Onus probandi.

P. received an oil engine from England which had been carried by train and steamer and had passed through various hands before it reached him.

Without taking steps to examine into its condition on receipt he delivered it in its case to B. & Co., *landing and forwarding agents, from whom again he received it at his factory after it had been carried on their wagon for some distance.*

The appliances provided by P. *for his servants to unload the engine from the wagon at the factory were entirely inadequate. On being unpacked the engine was found to be seriously damaged.*

Held, *that in the absence of clear proof that the engine was delivered to defendants for carriage in a sound condition and in view of the probability of the injury having been caused by improper handling by* P.'s *own servants at the factory* P. *was not entitled to damages claimed from* B. *for the injury.*

This was an action for £962 5s. 11d. damages, instituted by Carl Herman Poppe against the defendats, Bate & Co. The declaration alleged that the plaintiff is a merchant, carrying on business in Cape Town, and also owns a chicory factory at Retreat in the Cape Division. The defendants are Richard Bate and James Henry Richard Bate, carrying on business as landing and forwarding agents in Cape Town, under the style or firm of R. Bate & Co.

That in or about June, 1895, the defendants agreed with the plaintiff to land and to forward to the plaintiff's factory at Retreat a certain 10-horse-power oil engine, the property of the plaintiff, which had at that date arrived at the Docks in the steamship Basuto.

The plaintiff agreed to pay to the defendants for the above work the sum of £10 5s. 8d.

That it became and was the duty of the defendants to exercise all proper care and diligence in the landing and forwarding of the said engine, and to deliver the same in good order and condition to the plaintiffs, but owing to the negligence of the defendants, their servants, and agents, the said engine was broken in the course of the said operations and whilst under defendants' custody and control, and the defendants delivered the said engine to the plaintiff in an utterly useless condition.

By reason of the above the plaintiff has sustained damages in the sum of £262 5s. 11d., according to the account annexed; the items of the said damage are set out therein.

In addition to the items of damage above set forth, the plaintiff has been delayed and hindered in his business owing to his being unable to have the use of the said engine, and has sustained damages thereby in the sum of £700.

At the date of the said agreement, the plaintiff informed the defendants that the said engine was urgently required for the purposes of his business.

The plaintiff claimed as damages the sum of £962 5s. 11d., with costs.

The defendants in their plea admitted that they had agreed to forward the engine to the plaintiff's factory at the Retreat for the remuneration stated, but they denied that they agreed to land the engine from the steamer in which it arrived.

They said that the engine was not landed by them, but was received by them from the plaintiff's agents at the Docks, and was thence conveyed by wagon with all due care and diligence to the plaintiff's factory at Retreat, where it was taken charge of and unloaded from the wagon by the plaintiff's servants.

They denied that the engine was broken whilst in their custody and control, and they specially said that no breakage of the engine occurred whilst under their custody or owing to the negligence of themselves or their servants. They did not admit the damages alleged to have been sustained by the plaintiff, and they put him to proof of the same.

They admitted their refusal to pay the sum demanded, and prayed that the plaintiff's claim might be dismissed with costs.

The replication was general.

Mr. Juta, Q.C., and Mr. Smuts appeared for the plaintiff.

Mr. Graham and Mr. Benjamin for the defendants.

The evidence of the captain and officers of the S.S. Basuto, taken on commission, went to show that the engine received no damage whilst on the voyage from England to the Cape.

George Phineas Jupp, a clerk for some time in the employ of Attwell & Co., said he cleared an engine for Mr. Poppe from the Basuto on the 12th of June last. He handed the papers to defendant or somebody in his office. The case was marked A in a triangle.

By the Court: He believed he handed the papers over to defendant on the morning of June 12.

William Beatty, dock manager to McKenzie & Co., said he assisted in superintending the discharging of the cargo of the Basuto in June last. He remembered a case of machinery being discharged, which bore the mark of Attwell & Co. Witness's firm were agents for Attwell & Co. The case was placed in McKenzie's wagon, and appeared to be in good order. Nothing happened which could have injured the case. The case remained on McKenzie's wagon for a day or two on the East Quay, after which it was delivered to Bate's manager, one Spengler, who gave witness a receipt for it. Spengler then took the machinery to the West Quay. About two or three days afterwards Mr. Bate, sen., went down to the Docks, and had a conversation with witness. The latter asked how it was that Poppe knew that the case was broken. Mr. Bate said that the "——— driver" knew that it was broken. The case would probably be slung from one wagon to another without touching the ground. He did not see the case moved on to its side. The Harbour Board had nothing to do with the discharging of cargo.

By the Court: McKenzie frequently lent wagons to Bate, and *vice versa*.

Cross-examined: Witness had not a very clear recollection of the dates of the transaction. He had been told that Bate used the Harbour Board crane for removing the case from one wagon to another. He did not see the chain break. It would be very easy to move the case from its base to its side if a crane were used.

By the Court: He did not know of his own knowledge that the case was broken when he had a conversation with Bate. He had received information to that effect. The case weighed 2 tons 14 cwt.

John Henry Marshall, a coloured stevedore employed at the Docks, said he was engaged in discharging the cargo of the Basuto in June last. He had the case in question slung from the Basuto to one of McKenzie's wagons. Nothing happened to injure the case.

Cross-examined: It was customary to discharge cargo on the handiest wagon, provided that it was strong enough.

George Gray, in the employ of McKenzie & Co., said that when the case was placed on McKenzie's wagon it was standing right way up. After Bate's people had taken the case to the West Quay he saw the case lying flat on its side under the crane. He did not know why the box had been placed on its side.

Cross-examined: He saw the case lying on its side about two hours after Spengler took charge of it. He believed that the case was marked "This side up" on the top.

By the Court: He did not notice that the case was damaged at the time.

Francis Gow, a photographer residing in Cape Town, said he took the photographs (produced) of an oil engine at the Retreat in August or September last. The engine was standing immediately opposite one of two doors.

James Edward King, a wharfinger employed at the Docks by the Harbour Board, said the hand crane on the West Quay was used by the public free of charge. About the middle of

June last Mr. Taylor, the foreman engineer of the Harbour Board, reported to witness that a link in the chain was broken.

Cross-examined: The crane was put up thirty-five years ago, when it was able to lift five tons. Now it was only supposed to lift four tons, owing to the wear it had undergone.

By the Court: If the crane had been properly handled the weight of the case would have been insufficient to cause the chain to break. His theory was that the chain was broken owing to its having received a jerk.

Cross-examination continued: He had seen five, six, and seven men engaged in working a crane which was lifting a weight of three tons.

William Taylor, foreman engineer to the Harbour Board, said the cranes used on the quays were in his charge. A crane used on the West Quay was reported to him as having been broken in June last. The chain of the crane was tested in the previous March with the weight of four tons. If the crane had been properly worked it could not have broken, but if it had been improperly used it might have broken. His man Felix reported the breaking of the chain to witness. Bate's people did not report the breakage to him.

By the Court: His man could not find the broken link of the chain.

Examination continued: It frequently happened that when chains were broken the Harbour Board could not discover who had broken them.

Cross-examined: The chain had been in use about two and a half years. He believed that the chain was reported as being broken on June 15, and that it was repaired on the same day or the day following.

James Felix, in the employ of the Harbour Board under the last witness, said he found the chain broken on about the 14th of June last in the morning. There was nobody present at the time. According to general instructions, he looked for the broken link, but he did not succeed in finding it. The chain was repaired on June 15.

Job Jacobs, coloured, a coachman in the employ of plaintiff, said that an engine and machinery were brought to plaintiff's factory on two wagons in June last.

Carl Hermann Poppe, the plaintiff, said he owned a chicory factory at Retreat. In April last he ordered an oil engine from Crossley Brothers through Attwell & Co. About a month before the engine arrived, witness told defendant that he expected the engine, which was urgently required for use in his factory. When it arrived, witness had a conversation with Bate at the Docks. Bate offered to deliver it for £10 5s. 8d., but plaintiff said this charge was very high. Bate replied that the charge was so high because he took full responsibility for the engine as long as it was in his charge, and that he would have to pay for any accident that might occur. Witness then agreed to employ Bate at the charge named. On Friday, June 14, the machinery and engine arrived at Retreat on two wagons. The case containing the engine was then standing in its right position, top upwards. It was marked A in a triangle. The engine and machinery were removed by means of boards and rollers to the factory, the floor of which had been recently cemented. While the engine was being removed from the wagon to the ground one of the boards cracked, the engine slipped on to a roller, which was less than three-quarters of an inch lower than the bottom of the case.

By the Court: The case was not jerked.

Examination continued: The case was not jerked in any way in being removed. On opening the case his engineer discovered that the engine was broken. Since then witness had imported another engine, which despite the fact that it was driven over a stone, was not damaged in any way. The first engine was broken in half, and was totally unfit for use. On discovering the breakage he immediately wired the fact to Bate. He subsequently informed Bate, through his attorneys, that a survey would be held on the damaged engine at Retreat, and that Bate would be held responsible for the damage. Bate replied, through his attorneys, to the effect that he would be present at the survey, but that he disclaimed all responsibility for the broken engine. Witness noticed that the case in which the engine had been packed was also broken. The engine was broken right through on both sides. Several of the battens of the case had started; and they were situate on the same side of the engine on which coal-dust was discovered. The road to the Docks was covered with coal dust. The engine had smashed into the wood of the case more deeply on that side. The case was smashed on this side. The crack was a clean, fresh one, and could not have been made on board the vessel. The cement of the floor of the factory was then not quite dry. If the case had fallen on the floor, cement would have been found on the case, but none was found. On Saturday, June 15, witness interviewed Bate at the Docks on the subject. Defendant at first denied all knowledge of the affair, and eventually called for his man Spengler. No arrangement was arrived at. Witness then informed him that a survey would be held, but defendant at first said he would not

attend it. Witness asked defendant to remove the engine, but he declined to do so. The engine stood there now. By reason of the damaged engine, he was put to considerable expense in erecting steam machinery, which did not answer. He could do no work for five months, until the new engine arrived. His losses through stoppage of business amounted to fully £700 or £800.

Cross-examined: When the case containing the first engine arrived he signed the receipt produced. It was not true that two of the planks broke while the engine was being removed from the wagon to the floor, and that the case containing the engine slipped down the remaining plank to the ground, the nose of the case burying itself in the cement floor. The planks were not broken, but cracked. He had never admitted to Bate and others, that the planks were broken. The crack was quite new. He had never heard of a piece of rusty machinery being found in the crack or the case. There was no support under the cylinder when the engine was unpacked. At a later stage the witness admitted that one Donald had told him that a piece of rusty iron had been found in the engine. Last year he manufactured 224,000 lb. of chicory. He had about fourteen morgen of land under cultivation. He took over the factory in April, 1894, and from then until March or April last the sales amounted to about 1,000 cases, at £3 10s. a case. When he took over the business there were about 500 or 600 cases of chicory in stock.

August Lemetz, an engineer in the employ of the plaintiff, said that the men who removed the engine from the wagon broke the planks in two in order to get the engine out. A small mark in the cement of the floor was caused by the pressure of one of the corners of the case. If the case had rushed off the rollers on to the floor a large mark would have been made. The case containing the second engine was lowered in the same way. The first engine was cracked in one of its strongest parts, the part which had to sustain the explosions, which numbered ninety a minute.

Cross-examined: He did not consider that a support was necessary for the cylinder.

Robert Donald, a mechanical engineer carrying on business in Cape Town, said that on about June, 17 last he surveyed plaintiff's engine at Retreat in the company of other persons. The engine was broken through cleanly as far as could be seen. As he saw only one speck of rust, he was of opinion that the break could not have occurred on the voyage. One Harcombe found a piece of iron at the bottom of the case, which was slightly rusted, as if a drop of water had fallen upon it.

By the Court: Rust might form after one night's exposure to dew or any kind of dampness. The breakage did not appear to have been caused on two separate occasions. He saw a little cement on the case, but not sufficient to indicate that it had been dropped with force on the cement floor. The damage sustained by the engine was the result of a "pretty big" fall —a fall of two or three inches would not have caused it. The part injured would be the part upon which the most strain would be felt if the engine had a fall. When the engine was in working order, the part indicated was as strong a part as the remaining portions. The engine in falling had apparently broken in the floor of the case more deeply on one side than the other.

Cross-examined: He had stated, and was still of opinion, that the engine would have been more safely packed if a support had been placed under the cylinder, and if the case had been stronger. The engine apparently had had a fall at Retreat. He did not see Harcombe pick up the piece of iron produced. Harcombe told him that he had picked it up on the bottom of the case.

By the Court: The piece of iron produced came out of the broken part of the engine. While the survey was in progress, Poppe or Bate, he could not say who, said that the engine had had a fall at Retreat.

By the Court: It might have been Poppe or Bate; Poppe was present, at any rate.

Re-examined: Witness was told that the engine fell about one or two inches. Such a fall could not have been sufficient to cause the break. The break was caused previously, in his opinion, but doubtless subsequent jerks would have increased the breakage.

John Alexander Fellowes, clerk at Messrs. Attwell & Co.'s, said he was present at Retreat when the engine was surveyed. He had had some experience of machinery, and was decidedly of opinion that the fracture was a new one, and had not been done on the voyage. He saw the cement bed which had been prepared. It was not quite dry. If the engine had charged down from a wagon on to the bed it would have left an impression, but there was no impression. He had heard Mr. Harcombe say that the deals had broken, and saw him take two pieces to put them together, but they did not fit.

Cross-examined; Mr. Poppe had not made a claim against Attwells for damage. Attwells still had a claim against Poppe for the cost of the engines. It was admitted that two planks had been fractured in lowering the case, and one short piece had been broken off, but he believed the breakage was made to liberate the case. He considered the packing of the engine was adequate.

Joseph William Herbert, partner of the firm of Attwell & Co., said he had seen the case in the hold of the Basuto. He had told the captain to be careful in handling it. Some days afterwards he and Mr. Poppe went to the Docks and saw Mr. Bate, who at first denied that there had been a mishap to the engine, but afterwards acknowledged that the chain had broken during craning. Spengler, Mr. Bate's clerk, said the case had fallen about six inches. It had been lifted a little distance in order to put a deal under it, and the chain broke directly the full weight of the case came upon it. Mr. Bate offered to forego his charges for taking the case to Retreat, and would bring it back free of expense. The cranes belonged to the Harbour Board, but they took no responsibility, as they made no charge for their use.

Cross-examined: Mr. Bate had not proposed an arrangement whereby he and Attwells and the Shipping Company should forego all their charges that the engine might be sent back to the makers.

Jeremiah Thomas Gush, engineer for Mangold Bros., Port Elizabeth, said his firm had imported Crossley's oil-engines. He had seen the engine at Retreat, and it was packed as the others he had seen were packed. He considered the packing sufficient. The crack was the result of a heavy fall. The whole engine was smashed clean in half.

Cross-examined: He considered that the engine fell right side up. No less a fall than five feet would have smashed the engine so completely. It was packed so that it would have stood a drop of a foot. If the engine had been carried on its side gently it would have suffered no damage.

Hermann Tonnmach, chief engineer for Messrs. Siemens & Halske, Cape Town, said he had examined the engine at Retreat on July 10. Only a big fall could have caused the damage to the engine. There was an indentation of quite half an inch in the bottom of the case, and one of the battens at the bottom was cracked through. The portion of the engine which was broken was the portion which had to stand the greatest strain in working.

By the Chief Justice: The packing of the engine was quite sufficient for ordinary wear and tear.

James Hutton, foreman at the Locomotive Works, Salt River, said he had examined the engine. It must have fallen two feet or over to have received such damage. From marks which he saw on the case something had been underneath the case when it fell, and that had made the fall worse.

Cross-examined: It was not necessary to support the cylinder, which was well secured on the bed-plate. There were no marks on the case to show that the engine had run violently down a slope.

With the exception of evidence on commission, this closed the case for the plaintiff.

For the defence, Richard Bate, the defendant, said that he had arranged with Mr. Poppe to take the oil-engine in question to Retreat. He had charged £10, saying that he had to take the risk of an accident on the road, and had to pay Messrs. McKenzie £2 6s. for landing charges. He first saw the case on McKenzie's wagon on the East Quay on June 12 or 13. He examined the wagon to see if it was strong enough. He did not think it was strong enough, and had the engine removed on to his own wagon. When he saw the case on his wagon, there was not a scratch upon it. He took extraordinary precautions so that an accident should not happen *en route* to Retreat. On the day after the delivery took place, Mr. Herbert and Mr. Poppe saw him, and there was a conversation about the engine. He refused to go and see the chain of the crane which was said to have broken. On Monday he took out Mr. Harcombe to inspect the engine at Retreat. They were examining it when Mr. Harcombe took out a piece of rusty metal from the case, and pointed out a corresponding piece of rust in the fracture. He did not know that it was shown to Mr. Poppe, but the others "did not make much of it." There was some talk of the planks on which the engine rested having been broken. He asked the foreman of the works for the pieces of broken plank, but he said they had been used by the workmen. Two days afterwards he got a note from Mr. Poppe to say the broken plank had been found. He had lost the note. He did not go to see the plank. Some days after there was a discussion about the matter, and he said that to avoid litigation he would consent to forego his charges for the delivery of the engine and return it to the Docks if the agents did not charge commission, and if the makers of the engine would recast the broken part.

Cross-examined: He took all responsibility for any damages that might have happened to the engine from the moment it came under his control. He had heard from Spengler of the chain of the crane having broken. He did not deny all knowledge of it when Herbert and Poppe asked him about it. He admitted having said "that blooming driver" must have told plaintiff of the chain of the crane having broken. When asked to inspect the chain he had refused to go, not because he denied that the

chain was broken, but because it was useless going. Donald's evidence that the fracture was perfectly free from rust was not true.

Tobias Spengler, clerk for Mr. Bate for the past seventeen years, said that in June last the case containing the oil-engine arrived. It was placed on McKenzie's wagon, which was taken to a crane, so that it might be transshipped to one of Bate's wagons. The case was lowered to the ground from the one wagon, and was being lifted to the other, but before it was raised sufficiently high for a 2½-inch plank to be put under it at one end, the chain broke. The case was soon afterwards raised on to the wagon. The whole work was done carefully and expeditiously, He went to Retreat and saw the engine examined. He noticed Mr. Harcombe holding a piece of rusty iron in his hand, which he said he had taken from the engine. He examined the case containing the engine both at the Docks and at Retreat. The bottom of the case had not showed marks of a crack at the Docks, but there was a distinct crack when he saw the case at Retreat. At one end of the case he saw a little cement, and in the cement bed on which the engine was to stand was a groove more than a quarter of an inch deep. A driver, named Murphy, was not in a position to see the chain of the crane break. He had driven his wagon around the corner of a shed at the time.

By the Chief Justice: He could not say how it was that a chain which had immediately before held the full weight of the case should break in partially raising the case.

William Hoskings, clerk for Mackenzie & Co., said he saw Spengler and his men working at lifting the case in question. They had raised it two or three inches from the ground when he saw it. He passed by a few yards, then heard the rattle of the chain of the crane, and turning round saw the case on the ground. He did not notice that the case had sustained any damage.

Stoffel, a coolie in the employ of Mr. Bate, corroborated his foreman as to the height from the ground which the case had reached at the time of the breaking of the chain.

Cross-examined: He picked up the broken link of the chain and put it on one side, with the rest of the chain which had become detached. Spengler saw him do so. He did not see Spengler looking for the link.

Ibrahim, another coolie, gave similar evidence, except that he had not seen the broken link.

James Johnston, one of the hands employed at the crane in lifting the case, gave similar evidence to Stoffel. He saw the broken link on the wagon which contained the case. One side of the fracture in the link was rusty and the other bright. He had never told anyone about the link before coming into court.

Kippie, formerly in the employ of the defendant, said he went with the wagon conveying the case to Retreat. Eight men assisted in removing the case from the wagon. It ran down the incline of planks on to the ground. As the point of the case struck the ground one of the planks broke, and another snapped immediately afterwards, the case falling flat on to the ground. The fall was about four feet. The front of the case scored a hole, four or five inches deep into the concrete.

Joseph Benjamin Harcombe, engineer, said he had inspected the engine in question. He considered the packing insufficient. There should have been supports under and above the cylinder. He believed that the engine was broken before its arrival at Retreat. There was rust in a portion of the crack. The crack might have been completed at Retreat. His firm had imported three gas engines from Crossley's, and in two of the three the cylinder was supported. The unsupported one was a small one. The rust of the crack in the engine was more than two or three days old. There were two or three indentations in the cement floor of the engine-house, but only small ones; they had been almost obliterated in removing the case.

Cross-examined: There was a corresponding piece of rust on the fracture to that on the little piece of rusty metal he had taken from the fracture. He had pointed it out to Mr. Donald. The top part of the fracture to a depth of two or three inches was rusted on both sides. The lower part of the fracture was quite recent. He judged the expense of the breakage should be borne by all parties—the makers, because the engine was not properly packed; the shippers, because of causing the crack, which was rusty when he saw it; the defendant, because of the slight drop through the crane breaking, which might have increased the crack; and lastly, the plaintiff, because of the fall at Retreat, which completed the fracture.

By the Chief Justice: The deepest indentations in the bottom of the case were at the opposite end to that which fell from the inclined plane from the wagon. The fracture of the batten at the bottom of the case, he thought, had been caused by the run down the incline from the wagon.

Omar, a Malay driver for the defendant, said he drove the wagon bearing the case containing the engine to Retreat. The case was removed

from the wagon by means of running it down an inclined plane of planks. The case overpowered the men who were endeavoring to restrain it from running down too quickly, and one end dashed with great force into the ground. Then the planks broke, and the other end fell some distance to the ground.

Cross-examined: There was a barrel placed under the planks, not touching them but to support them when they bent. The barrel was not broken after the accident. He did not see the case loaded on to the wagon at the Docks, and knew nothing about a chain having broken.

George Murphy, called by the Court, said he was a watchman, and was on the wagon which carried the engine to Retreat. He removed the case when on McKenzie's wagon from the East Quay to the West Quay to bring it under the crane. He did not see the crane chain break, but he heard of it, and told the plaintiff's men.

By Mr. Graham: He helped to remove the case from the wagon at Retreat. It rushed down the planks very fast, and when the planks broke the other end of the case fell a distance of four feet.

By Mr. Juta: He told Poppe's men that it was a lucky thing his wagon was not under the case when the chain broke or the wagon would have broken. The barrel under the planks was an ordinary cement barrel.

By the Chief Justice: He did not understand that the case came down with great force when the chain broke.

George Ernest Smithers said that on June 14, at two o'clock in the afternoon, he saw three large packages on the West Quay near the crane. One of them was badly damaged. It was not the case belonging to the defendant. It was addressed, "Clark, Bulawayo."

Cross-examined: No experienced man, such as a steamer's captain, would mistake the two cases.

This closed the case for the defence.

Mr. Juta at this point asked whether, upon the pleadings and upon the law as to onus of proof, he was not entitled to call rebutting evidence on the point as to whether the plaintiff's negligence had caused the damage.

The Chief Justice said: Any evidence tending to elucidate the truth in this matter must be admitted.

Mr. Graham said he would like to assist in finding out the truth of the matter, but it would be most extraordinary after he had produced the whole of his evidence that the other side should be allowed to call fresh evidence. His whole cross-examination had been directed to show contributory negligence. He also held the letter which Mr. Bate could not find before, stating that the piece of wood which could not be found when the surveying party was at Retreat had now been found, and might be inspected.

The Chief Justice said that if the plaintiff were not allowed to call the witnesses referred to, the Court would do so.

Edward Sisley, called by plaintiff, said he was a carpenter employed by the contractor for the building of Mr. Poppe's shed at Retreat, and had assisted in lowering the case containing the engine from the wagon. The lowering was done very carefully and easily, and could not have been done better. The planks cracked, but did not give way to the ground. The planks afterwards were sawn through by the foreman carpenter, so that they could afterwards be used without danger of splinters entering the workmen's feet. The planks cracked a foot or two away from the end resting on the ground.

Cross-examined: The planks had not been broken off to release the wagon.

Hendrik Neethling, foreman for Mr. Poppe at Retreat, said he had assisted to lower the engine. It could not have been lowered more gently. The planks cracked behind the case, but it did not fall. The planks had to be broken off to release the wagon.

Cross-examined: There was only a small scratch in the cement which the case was lowered upon, and that was due to the cement not having been set.

Robert Coller, employed by Mr. Poppe, said he had helped to unload the case from the wagon. The case did not rush down the planks, neither did the planks break nor the case fall.

Hans Swats, workman for Mr. Poppe, corroborated.

It was not considered necessary to read the whole of the evidence taken on commission, but only that of the foreman packer of Crossley's, the makers of the engine, which was to the effect that the engine was packed in the usual manner.

After Mr. Juta had addressed the Court for the plaintiff,

The Chief Justice said: It is not necessary to call upon Mr. Graham. It is very much to be regretted that the plaintiff in this case did not on the arrival of the case containing the engine immediately thoroughly examine it before he took possession of it. He knew that the case with the engine in it would have to undergo severe handling at different parts of its passage from one portion of the world to another. He knew it was a very heavy case and would be transshipped on its way from Manchester to his place at Retreat several times. He knew also, as he himself said, the engine

was a very fragile machine, and there was always the chance of its having been injured during the course of its several transshipments. Yet he made no effort to examine the engine before he took charge of it. He knew also that he had no proper mechanical appliances for the purpose of removing the case from the wagon to the room where it was to stand. It does not appear that he had even a crane for the purpose of removing this engine from the wagon. The men had to use the most primitive appliances possible for the removal of this heavy case from the wagon to the ground. The engineer on the spot, it is true, did the best he could under the circumstances, but I repeat that it is to be regretted that Mr. Poppe, the plaintiff, knowing that he had not got these appliances and knowing also of the risk of injury on the way, did not examine this case before he took possession of it. It is not necessary to trace the history of this engine all the way from the manufacturers to the hands of the plaintiff, but we may just consider the evidence of the foreman packer for the manufacturers. He states that he packed this engine in the same way as he had packed twenty thousand others previously, and that only one in this large number had ever been broken. On the other hand witnesses, men of repute, say that this engine was not properly packed. An engineer, apparently of some standing in England, said that in his opinion there should have been a support under the cylinder, and that at all events there should have been bolts screwed into the engine for the purpose of keeping it tight and firm. Two other gentlemen, one being the surveyor appointed by the plaintiff, Mr. Donald, and another, Mr. Harcombe, agreed that the packing was not proper packing, and that there should have been a support under the cylinder for the purpose of keeping it secure. They agree that it was as necessary as a suppo t from above. It is quite true there are other witnesses who say that the packing was sufficient. All I wish to say now is that I do not wish it to be understood that, in my opinion, the packing was all that it should be. It is a question that should not now be decided, because I do not wish to state that in case the plaintiff finds that he has no remedy against the defendants, that we are also of opinion that he has no remedy as against the makers of the engine. There are many witnesses to show us that the engine was put in its case, placed on a trolley, taken down the Ship Canal, from thence to London, and shipped on the Basuto. These witnesses show that the work was all very properly done, but one cannot help feeling that whilst all that these witnesses saw was very right and very proper, yet, at the same time, when one or other of the witnesses was not looking, this case might probably have had such ill-treatment as to account for anything that happened to it. It is not possible to bring a single witness who had traced this case from the time of its leaving Manchester up to the present. It would be a great hardship to the defendant, without clear evidence, to say, "You are the person who caused the damage," and make him the scapegoat. It would not be proper to say "You are to be liable for this breakage, notwithstanding the fact that the engine passed through very many other hands." But, again, I will assume that the engine arrived here safely, and that no injury was done to it until it came into the hands of the defendants. That is a wide assumption, because if one looks at the crack, and at the piece of metal taken from the crack, rust is found upon it, and according to Mr. Harcombe that rust shows that it was an old crack, which took place before the engine arrived in this colony, and his opinion is fortified by that of Mr. McDonald, who also believes that some injury had been done to it previously, and that the final injury must have been done at the last moment when the engine was placed in the shed of the plaintiff. But now we are reduced to the question as to where this injury did occur: Did it occur whilst the engine was in the custody of the defendant or while it was in the custody of the plaintiff? Here again, if the plaintiff had examined the engine before he had taken charge of it and had found the crack, that would have thrown the onus upon the defendant to show that he was not the cause of it. But seeing that the engine passed through the hands of the defendant and then afterwards to those of the plaintiff—from the wagon to the shed—it is impossible to say that the whole onus must be thrown on the defendant. Now comes the question of credibility. There is not a single witness to prove that this engine came down with any force at the Docks when the chain broke. All the witnesses proved that what took place at the Docks was to this effect: That the case was lying on its side, where it had been placed with the intention of putting it on the wagon on its side, but afterwards it was found that it would not be so convenient to put it on a fresh wagon on its side, and it was determined to put it on the wagon in its original position—the proper side up. Whilst still on its side it had been lifted, and whilst one end was a little higher than the other, and before

the lower side left the ground, there was such a strain on the chain that it broke, and the case fell to the ground. That the fall it thus received could not have produced that fracture I am perfectly satisfied. From what I have seen of the box and the engine, the injury could not have been occasioned by the box falling on its side. Everything points to the injury having been done while the box was standing in its proper position, and the only fall, so far as the defendant is concerned, is the fall whilst this case was lying on its side, and there is nothing on the case to show signs of that fall. Mr. Juta says that the fall which the case had was when it was on its proper side, and he points out some coal dust which is upon the crack in the wood, and says that the coal dust could not have come there unless the case had been cracked whilst at the Docks. We have gone down to examine it and are convinced that the marks are those of liquid coal dust. It has penetrated into the wood. It was not coal dust, it was coal mud. It is curious, too, that on that one part there should be coal dust or mud, while the rest of the neighbourhood is perfectly white It is a curious circumstance also that the sides of the case, which I have also been to examine, and the case has admittedly been standing on its side, show no signs of coal dust. At that one particular crack there is more coal dust than upon all the rest of the box put together. If there had been no evidence given at all as to the negligence by the plaintiff, I still would have had very serious doubts as to whether the damage had been done by the defendant. I may say that I do not like the manner in which Mr. Bate gave his evidence. It was most unsatisfactory. As a witness, Spengler was also most unsatisfactory. They were the two most unsatisfactory witnesses in the proceedings, and to that extent defendant's case has been somewhat damaged. I looked with suspicion on the great care which Mr. Bate took with regard to the wagon which was to take the engine to Retreat. The way he examined it, &c., I confess made me strongly suspect that Mr. Bate knew there had been some damage done to the case, and in order to secure himself, took all those extra precautions that nothing should go wrong with the wagon. That in connection with the way in which Mr. Bate generally gave his evidence seemed to point to some concealment of an important fact. Another circumstance was that of the way Mr. Spengler spoke about the link of the chain. He said he had been looking about for it. If he had looked much for it he must have thought that some injury had been done to the case. Then there were two other witnesses who showed that they were prepared to go to any extent in their evidence; one saying he had actually seen rust on the link, whilst another, speaking of what he saw at Retreat, said that a mark half a foot in depth had been made in the cement by the charging down of the case into it. All these circumstances would have tended to cast grave doubts on the evidence for the defence. At the same time, this is a case to be decided by the probabilities between two sets of witnesses, and is not a case to be decided on mere suspicion. I also think while commenting upon the defendant's witnesses one cannot help commenting upon the evidence of the plaintiff's witnesses. Some of them did not give their evidence in a perfectly straightforward manner. Lemetz, for instance, in giving his evidence, would have us believe that there was only a slight crack in the two planks down which the case slid into the shed, and in order to account for the broken pieces of planks not being before the Court, he says that the plaintiff's men moved them up and down to various places, and took them away. Sisley denies that *in toto*. He says the whole of these planks were removed by his foreman, and on the same day were sawn up by his foreman. That was as of as much importance as the link matter at the Docks. The non-production of these pieces of wood is of as much importance as the non-production of the link. If the case rushed down the slope with such force as to throw it back, so that the back part struck the planks so as to break them through completely, that would have proved that the case came down with some violence upon the cement. The cement was said to be very soft, but it had been laid some couple of days, and must have been nearly as hard as if it was perfectly dry. It must, at any rate have been so hard that even a big case coming down upon it would not necessarily have produced a very visible mark upon the cement. The marks were certainly not so pronounced as Kippie, one of the witnesses for the defendant, would wish us to believe. We find on looking at the photograph that the bottom of the case is somewhat bent, and it is just bent in such a way as it would have been if the case had gone head foremost and struck the cement. Then, again, the crack in the wood of the bottom of the case is exactly the kind of crack which would have been made if the defendant's witnesses spoke the truth; because there was the whole weight of the bed of the engine lying on the bottom, and just at the points where the greatest weight would be the wood is forced downwards. In my opinion the state of the damage to that case and the state of the engine are exactly the kind

of cracks and breakages which would have been caused by the engine going down an incline head foremost. With these facts before the Court, notwithstanding the suspicious circumstances which occurred whilst the engine was in charge of the defendant, the judgment must not be against the defendant. The plaintiff has really himself to blame if hardship is done to him by our judgment. One more thing I wish to comment upon is the evidence of Captain Ladds, if his evidence refers to this particular case when lying at the Docks. He saw it lying there on its side—he seems positive it was the case. He said: "I could see it was shaken, the nails were shifted all round. The case itself seemed uninjured." This evidence shows clearly that he could not have referred to this case if it has not been in a worse condition than that in which we now see it. If Mr. Poppe had found the case in the condition which the captain here describes it *e.g.* that the "nails were shifted," &c., it would have raised some suspicion in his mind, and he would have examined it. It may be said that the defendant could have sent a carpenter to remedy it, but there is no evidence whatever to that effect. The Court has gone very fully into the case, and we are not satisfied that the plaintiff has proved his case. The probabilities appear to be in favour of the view that the accident was caused by the manner in which the plaintiff's own people handled this case. When the plaintiff took it into his own hands he should have had better appliances than he had—something better than the primitive appliances used by him for the purpose of shifting the case from the wagon. The verdict must therefore be absolution from the instance with costs.

Mr. Justice Buchanan concurred. He said: This is really a jury case. I am under the impression that the case had a fall at the crane, and also had a fall at Retreat. The fall at the Docks was a fall on its side, and from the evidence I believe that the fall on its side did not break the engine. If the injury was done by one fall it was not the fall which it sustained at the Docks. I cannot but refer to the unsatisfactory nature of some of the evidence, but I do not think it probable from the evidence before us that the injury was due to any negligence on the part of the defendant.

Mr. Justice Maasdorp also concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorney, W. E. Moore.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

WHITE, MULLER AND COMPANY v. SPENDLOVE. } 1896. Feb. 6th.

Mr. Buchanan applied for the final adjudication of the defendant's estate.

Order granted.

BOOTHBY V. CUTLER.

Mr. Jones applied for provisional sentence for £44 18s. 9d., less £20 paid on account, on a promissory note.

Provisional sentence was granted.

HANSEN AND SCHRADER V. PICKARD.

Mr. Benjamin applied for provisional sentence on four promissory notes, each of £115 0s. 3d., together with interest at the rate of 12 per cent. per annum, £1 8s. for exchange, and 8s. stamps.

Provisional sentence granted.

LANGSCHMIDT V. RUSSOUW.

Mr. Buchanan applied for provisional sentence on a mortage bond for £285, with interest at the rate of 6 per cent. per annum from September 1, 1893, less £5 paid on account, and for the property to be declared executable.

Provisional sentence was granted, and the property declared executable.

ADMISSION.

Ex parte BRINKMAN.

Mr. Buchanan applied for the admission of Lambert H. Brinkman as an attorney and notary, the oaths to be taken before the Magistrate at Philip's Town.

The application was granted.

GENERAL MOTIONS.

In re INSOLVENT ESTATE OF ALBERTUS C. J. BOLL.

Mr. Molteno applied for authority to the provisional trustee to finally liquidate the estate, by reason that no permanent trustee was elected

at the second meeting of creditors, and that no election is likely to be arrived at at any subsequent meeting.

The application was granted.

MURPHY V. MURPHY.

Mr. Close, on behalf of applicant, applied for leave to sue by edictal citation in an action against his wife for divorce by reason of her alleged adultery, and for directions as to the service of the process and time for appearance.

Leave was given to sue by edictal citation returnable on the last day of term, personal service to be made. If personal service cannot be effected, another application may be made on the last day of term.

Ex parte EYTH. { 1896.
EYTH V. EYTH. { Feb. 6th.

Evidence – Divorce—Plaintiff's poverty.

Where a plaintiff in a divorce suit, who resided in Namaqualand, was unable owing to poverty to come to Cape Town to be present at the trial, the Court allowed his evidence to be taken on commission before a Resident Magistrate.

This was the petition of Karel Eyth, of Naroep, Boesmansland.

The petitioner alleged that he was in very poor circumstances.

That he had instituted an action against his wife by reason of her adultery with one George Wiley, with whom she was living and by whom she had three children.

That the declaration and notice of trial had been served on the defendant but that she had not entered appearance.

That owing to his poor circumstances he was unable to defray the necessary expenses of a journey to Cape Town, to be present at the trial, nor could he bear the loss which would be sustained by him through the lengthy absence from his business affairs which such a journey would entail, and that if he were compelled to come to Cape Town he would be debarred from his remedy.

The petitioner prayed that the Court would be pleased to grant an order directing that his evidence might be taken on commission before the Resident Magistrate of Springbokfontein in the division of Namaqualand.

There was further evidence before the Court as to the applicant's needy circumstances.

Mr. Graham moved.

The Court granted the order as prayed and directed that the applicant's evidence should be given before the Resident Magistrate of Springbokfontein.

[Petitioner's Attorney, G. Montgomery-Walker.]

Ex parte DAWSON'S EXECUTORS. { 1896.
{ Feb. 6th.

Executor testamentary—Long absence from the Colony—Land—Conveyance.

Under special circumstances the Court authorised three executors testamentary, the fourth being long absent from the Colony, to pass transfer of land vested in the estate to a purchaser.

This was the petition of three of the executors testamentary of the estate of the late David Smith Dawson, the fourth executor being one Wilhelm Joseph Stollreither.

On the 4th June, 1895, there was registered in the name of the late D. S. Dawson a certain lot of ground in Port Elizabeth by order of the Court under the Titles Registration and Derelict Lands Act, 1881.

The petitioners have since sold the land to one Miller for £150, and are desirous of giving transfer in customary form.

The remainder of the estate as regards the landed property was wound up several years ago.

Stollreither, who is believed to be resident in Germany, has been absent from the Colony for several years. He left no authority to anyone to represent him in the matter of the estate, nor does he hold any communications with the petitioners or with anyone in the Colony as far as the petitioners know.

Owing to the want of his signature to the power-of-attorney authorising the transfer to Miller the necessary conveyance cannot be passed, the Registrar of Deeds ruling that the power should be signed by the four executors.

The petitioners were being pressed to complete the transfer and they prayed the Court to empower them to pass the transfer without the concurrence of the absent executor.

Mr. Close moved.

The Chief Justice said: There are special circumstances in this case which will justify the Court in making the order. Stollreither has been absent for many years, and the value of the land is very small. Transfer is required for the purpose of closing the estate, and three

executors out of four remain here to perform their duties. Under these special circumstances the Court will grant the order.

[Petitioners' Attorney, G. Montgomery-Walker.]

Ex parte HEYDENRYCH AND CROLE.

Mr. Sheil moved for the appointment of Mr. James Geddes Newlands as provisional trustee in the insolvent estate of Henry Wallace Lynch, with power to carry on the business and sell perishables pending the election of a permanent trustee.

The Court appointed Mr. Newlands provisional trustee, with the powers asked for.

Ex parte JACKSON.

This was the petition of Mary Elizabeth Jackson. The petition alleged that she arrived in Cape Town on 4th of February last by the Norman from England.

That she was engaged in Manchester as a general servant by one Anne Gordon during December, 1895, to accompany her to Johannesburg, there to serve as a general servant for a period of two years, from the date of the arrival of the Norman in Table Bay.

That it was agreed between the parties that the petitioner was to receive as wages £2 per month for the first year, and £2 12s. per month for the second year, with free board and lodging.

The petitioner alleged that in accordance with her agreement she embarked on board the Norman at Southampton on the 18th January, 1896, for South Africa, and continued to perform her duties as general servant until the 28th January last, upon which date Mrs. Gordon dismissed her from her service without just and reasonable cause, and has since refused to grant her any redress, or pay her any wages.

That when she was engaged by Mrs. Gordon she produced a two years' character from her previous situation.

The petitioner further alleged that she knew that Mrs. Gordon intended leaving to-night or very shortly for Johannesburg to join her husband, and that in consequence of the wrongful acts above mentioned she was left penniless and destitute without friends or relations in a strange land.

That she was not aware that Mrs. Gordon possessed any other property in the Colony except her personal luggage, at present at the Palmerston Hotel, Plein-street.

That she was desirous of suing Mrs. Gordon for £50 damages for breach of contract and wrongful dismissal, and that in consequence of Mrs. Gordon's intended departure from the jurisdiction of the Court it would be necessary to obtain an order to attach her goods to found jurisdiction, and to sue her by edict.

The prayer was for an order attaching Mrs. Gordon's goods to found jurisdiction, and for leave to petitioner to sue by edict for the recovery of £50 damages.

Mr. Graham moved.

The Court made no order.

The Chief Justice, after referring to *Einwald* v. *The German West African Co.* (5 Juta, 86), said: I think that this contract must be regarded as one to be performed in Johannesburg. It is true that the contract was to commence from the time the vessel arrived in Table Bay. But it was not supposed that more than a couple of days would be served in the Colony. It was as if the parties had been on a vessel on her way, say, to Delagoa Bay, and staying in the Table Bay for a few days. If the breach of contract happened during that time, it is quite clear that the Court would not grant relief. It does not affect the present case that the parties happen to be travelling from the Colony by train, instead of by sea. It may be a hardship on the applicant, but the Court can only administer the law. There would be no order on the application.

[Applicant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS. K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

BERNHARDIEN V. INTILLAH. { 1896. Feb. 10th.

Mr. Graham made an application for the appointment of a commission to take the evidence of a certain witness, who is in a delicate state of health.

The application was granted, and Mr. Jones appointed commissioner.

REGINA V. DAMON CHARLES.

The Chief Justice said that in the case of Damon Charles, who was tried for bestiality before the Resident Magistrate at Simon's Town, the preliminary examination was taken before Mr. Purland, A.R.M., Simon's Town, and the case

remitted to the Resident Magistrate for trial. The case was tried before another Magistrate, who recalled the witnesses; but he did not proceed as in an ordinary case to let the witnesses give their evidence, but he simply read over their evidence and then gave the prisoner an opportunity of cross-examining. As there was no appeal the conviction could not then be quashed. If the prisoner had raised objection and appealed it would have been the duty of the Court to have quashed the conviction. His lordship, however, did not think a jury would have convicted the prisoner on the evidence, and seeing that there was a technical illegality, and as the evidence was extremely doubtful, the Court was of opinion that the conviction ought to be quashed. The matter had been referred to the Attorney-General and he had informed the Court that he was not prepared to support the conviction. The conviction would, therefore, be quashed.

BLACKING AND IZDEBSKI v. GASSON. { 1896. Feb. 10th. „ 12th.

Sale—Completion of Contract—Determination of price by third party—Witness expenses of successful party.

Where it was alleged that G. *had agreed to sell to* B. *a half share in his interest in a gold-mining syndicate on* B.'s *undertaking to pay up any calls that might fall due, but that* G. *had failed to carry out the terms of the contract,*

Held, *that the contract not having been put into writing and there being no other clear evidence that the parties definitely understood that a contract of sale had been entered into, plaintiff was not entitled to recover damages claimed for breach of contract.*

Though G. *had succeeded in the action the Court disallowed his witness' expenses to mark disapproval of a want of candour in giving his evidence.*

This was an action instituted by Frederick Blacking and W. Martin Izdebski against Wm. Gasson for £5,000 damages for breach of contract.

The declaration alleged that the plaintiffs reside at Beaconsfield, and that the defendant is a chemist residing and carrying on business at Kimberley.

That on or about the 17th August, 1895, the defendant was the owner of a £100 share in a certain syndicate called the Mint Syndicate, which had been formed at Kimberley for the purpose of prospecting and developing certain properties in the province of Griqualand West. The sum of £20 had been paid up in respect of the said share, and it was at the said date known to the defendant and the plaintiffs that a further call on the said share was about to be duly made.

On the said date an agreement was entered into, the plaintiffs of the one part, and the defendant of the other part, in terms of which the defendant, in consideration of the plaintiffs paying to him the amount of the said call, sold and agreed to assign and transfer to the plaintiffs one-half of his right, title, and interest in the said share.

On or about the said date, a call of £80 was duly made on the said share, which the defendant became liable to pay.

Thereafter the plaintiffs duly tendered to the defendant the sum of £80, being the purchase price of the said half-share, but the defendant refused to cede or assign the same, and rejected the said tender, and wrongfully repudiated his said contract.

By reason of the wrongful and unlawful breach of contract by the defendant, the plaintiffs have been prevented from disposing of the said half-share, as they could have done, at a large profit, and have suffered damage in the sum of £5,000.

The plaintiffs claimed £5,000 damages for breach of contract, and costs.

The defendant, in his plea, denied the agreement. He admitted that a call of £80 was made upon him in respect of the share, which he duly paid. He admitted the tender and his refusal to give cession, and he denied the alleged damage.

Mr. Schreiner, Q.C., and Mr. Watermeyer for the plaintiffs.

Mr. Searle, Q.C., and Mr. Molteno for the defendant.

Fred. Blacking said he was a butcher residing at Beaconsfield. He knew Mr. Gasson, who was engaged to go to Bechuanaland to his (witness's) farm to take samples and assay them. On August 16 last witness saw Mr. Gasson and Izdebski at his shop. Gasson had been in Bechuanaland, and witness went to his shop to see the samples of ore. They looked through the samples. Witness knew there was a Mint Syndicate in which Dr. Murphy and Mr. Attwell were interested. Gasson said they were to have a meeting that afternoon to make a further call. He said, "If you like to pay the call I'll let you have a half-share." Witness said, "All right, Gasson. Let me know the

amount, and I'll send you a cheque." Mr. Izdebski said, "How shall I come in?" Witness said, "You can have half-share with me." Gasson then said he was prepared to attend the meeting and pay the call. Witness saw Gasson on the 19th August. Previous to this witness saw Mr. Mendelssohn, who had been at the meeting. Witness afterwards saw Mr. Gasson on the Monday morning. Witness congratulated Gasson on his being offered £500 for the share. Witness said, "I should advise you to sell it; we must congratulate ourselves." He said, "What do you mean?" Witness said, "Izdebski and myself have a half-share with you." He said, "No, I don't see my way clear to let you in there."

By the Court: Witness would have had to pay the call.

Examination continued: The offer was not made to witness. Witness said, "We'll see about that." Witness then left the shop. Gasson owed witness £120 for money advanced. Witness said, "Gasson, I'll give you a receipt for the £120 and settle the half-share that way." Gasson replied, "No, I won't have that." A bill of Gasson's was coming due the next month. There was a call of £80 due which witness was prepared to pay. Witness thought he would give a clean receipt in lieu of payment of calls. Witness left the shop as two ladies came in. He might have used strong language. Had witness got the share he would have sold it.

Cross-examined by Mr. Searle, Q.C.: Witness had agreed to pay Gasson one per cent. on all the profits made in the venture for assaying work. Gasson is a connection of witness by marriage, having married witness's wife's niece. Witness was pleased with the samples from Bechuanaland, which seemed to promise well. Witness had assisted Gasson in connection with a chemist's business, and on the 7th December, 1894, Gasson signed a promissory note for £150, the balance of which was to be due on the 7th of the following September, according to renewal of promissory note, £120. On the due date, the promissory note witness promised to cancel was paid. Mr. Gasson was doing well in his chemist's business. Gasson at the interview did not say he should want some assistance in a syndicate. Witness had assisted Gasson as a friend, but not for syndicate shares. Witness had never had any report from Gasson as to the value of assays. Gasson never discussed the syndicate with witness. Witness was willing to pay the call whatever the amount had been for the half-share. Gasson did not tell witness he had paid the call. Gasson never said, "There has been no call made." Witness had never spoken to Gasson since Monday, August 19. Gasson never said, "There has been no call made I have not been able to meet." Witness never said, "Give me a quarter-share and I will write off the £120." Witness did nothing in the matter until Wednesday, August 21, when a cheque was sent on behalf of witness and Izdebski for £80. Gasson returned the cheque for £80. The shares were £500 on the Saturday, £3,000 or £4,000 on the Monday, and then went out of the market. Witness never asked Garson for any document. Witness did not take his cheque-book with him on the Monday, and he never carried his cheque-book about. Witness never told Gasson he was going on the share market. Witness was on very friendly terms with Gasson. As to the money witness lent to Gasson, Gasson said he was getting together all the money he could to meet the promissory note for £120. Witness knew nothing as to the rights claimed by the Mint Syndicate in the Herbert Sovereign Syndicate. He believed the promoters were the same. Witness had heard since that the Mint Syndicate had acquired certain rights.

Re-examined by Mr. Schreiner, Q.C.: The reason witness did nothing until the letter of August 21 was because he did not go to Kimberley on the Tuesday. On the Wednesday he instructed Mr. Coghlan to send the cheque for £80. Witness knew nothing as to the number of members in the syndicate, but he knew several members. He was prepared to pay whatever amount the call came to.

By the Court: Gasson said he was prepared to meet the call; what he meant was that he was prepared if witness paid the call on the half-share. On the Monday witness knew the amount of call. He had done Gasson lots of good turns, and was prepared to give the £120, although the call was only £80.

The Chief Justice: I don't understand the cause of your great liberality on the Monday.

Witness said he wanted the contract fixed. He wanted to give a receipt for £120 so as to get it off the books. Witness at that time had no notion what the call would amount to. Syndicates never made a heavier call than £200 or £300.

William Martin Izdebski, chief detective stationed at Beaconsfield, said he knew Mr. Gasson, also Mr. Blacking. On August 16 he went to see Mr. Gasson with Mr. Blacking. They went to see as to the assays of samples from Bechuanaland. Witness had no interest in that property, as he did not go with Gasson. Witness merely went to see the result of the assays. Witness and plaintiff went into the assaying room

behind the shop, where they saw the samples of quartz. Gasson said he had not had time to treat them. After some conversation Gasson addressed Mr. Blacking. He said, "Look here, Fred, I'm interested in a syndicate in which a call of £20 has been paid. Now, there is another meeting this afternoon, and we intend to make a further call." He said that he could not take further money from his business, and that if Mr. Blacking paid the next call he might stand in halves. Witness examined some quartz at the time, and witness said to Blacking, "Where do I come in?" Blacking said, "All right, Gasson," and said to witness, "You can halve my share." Gasson said, "I'm very glad you've joined in with me, because I shall be able to go to the meeting this afternoon prepared to pay the next call." Blacking replied, "Very well, Gasson; let me know what the next call is, and I'll give you a cheque." Witness and Blacking then left. On Saturday morning witness again saw Gasson in his shop. Witness told Gasson he had seen Blacking. Gasson said, "Nothing whatever was mentioned about a syndicate share." He said, "I simply wanted to borrow money from Blacking." Witness said, "Do you mean to tell me you said nothing about the syndicate share, and that it was not your proposal Blacking should have half?" He said, "No; nothing of the kind. Izdebski, I am surprised you should come here and try to do me out of my share." I replied, "I am not trying to do you out of the share." Witness then left the shop.

Cross-examined by Mr. Searle, Q.C.: Witness had been intimate with Blacking, and met him on the share market. Witness was not particularly anxious to get any interest in the syndicate. Witness said, "Where do I come in?" He had stood in with Blacking in several things before. Witness knew Blacking had assisted Gasson in his business; but he knew nothing as to the amount of the promissory note. Witness thought the call might have been about £20. Gasson said, "I shall go prepared to pay the call." This was provided Blacking and witness went in with him. Witness knew Mr. Blacking and Mr. Gasson were related, therefore that was the reason witness did not propose that some document should be drawn up. Witness had seen the article in the "Diamond-fields Advertiser" on the Tuesday, but he had not seen Gasson since he (witness) had read the article. He knew that the syndicate went up and down in a week. The newspaper article stating that the shares were at an enormous premium appeared in the "Diamond-fields Advertiser" of August 20. The letter enclosing the cheque for £80 was written he following day.

By the Court: Witness did not go to Gasson on the 16th August with any intention of buying shares. When he heard that Blacking was getting the half-share witness was willing to go in with Blacking. Had the shares dropped between the Friday and the Monday witness would have considered Blacking and himself would have had to stand by their liability. He believed Gasson would have expected this.

Charles Frederick John Coghlan, member of a firm of attorneys practising in Kimberley, said he had acted for the plaintiffs. The letter was written by his brother James Coghlan. Witness was an original member of the Mint Syndicate, which was formed in the latter part of July. The promoters were Mr. Seavill. Mr. Attwell, and Dr. Murphy. The subscribing members were all good people. Mr. Gasson was present at the meeting on the 16th August. At that meeting the amount of the call was fixed at £80. On the following day there was another meeting as to rights in the Herbert Sovereign Syndicate. Members of the Mint Syndicate were to get two shares in the Herbert Sovereign Syndicate. The call was to be paid at once, and the money was paid on the Saturday. Mr. Seavill was the secretary of the syndicate, and he collected the calls. Each member consented to pay the £80, though £20 was all that could be demanded. Witness let a friend of his take over half his share at par. Witness had an offer of £500, which he did not accept. Witness was sorry to say he had the share still. There was truth in the rumour that the De Beers would come in; but this did not go through owing to certain obstacles being put in the way of the arrangement by Dr. Murphy. The fact that De Beers had taken up adjoining properties made the shares go up. The shares were very firmly held, but by the end of September the syndicate had broken down.

By the Court: Witness received the instructions for the declaration.

Cross-examined by Mr. Searle, Q.C.: Witness had nothing to do with the letter enclosing the cheque for £80. The promoters of the two syndicates were the same people. Witness did not know what was stated at the meeting held on the Saturday. No call beyond the £80 had been made.

Frederick White, sharebroker, Kimberley, said he had carried on business in Kimberley for fifteen years. He remembered the Mint Syndicate. Witness purchased one-eighth of a share on August 24. He paid £300 for it Afterwards witness offered £750 for a quarter share. Mr. T. S. Morgan was his principal. He was offered £450 for his one-eighth share. It was known on the 24th that the De Beers Company had taken an interest in the syndicate.

Cross-examined by Mr. Searle, Q.C.: There was no market for these shares now. He did not think a buyer could now be got. A week after the 24th August he had heard of no buyers.

This closed the case for the plaintiffs.

For the defence

William Gasson, chemist, Kimberley, said he had lived in Kimberley six and a half years. Witness went in for a share in the Mint Syndicate about the end of July. This, with the exception of one syndicate in Mashonaland, was the only time he had gone into a syndicate. Witness went into Bechuanaland, and brought back samples of quartz for assay. On Friday, August 16, he was present at the meeting of the Mint Syndicate. The call of £80 was made because Mr. Attwell, the promoter, had spent about £600. He had heard of the Herbert Sovereign Syndicate. The Mint Syndicate were to get some shares in the Herbert Sovereign Syndicate. On the 17th August it was arranged what should be settled between them. Witness saw Blacking and Izdebski on August 17. They came to witness's house to see the samples, which were shown. They seemed pleased. Blacking requested an assay as soon as possible; and as they were about to leave the matter of the Mint Syndicate and the Herbert occurred to witness and he said, "In case I should require more money will you be prepared to support me?" Blacking replied that he would help witness. Nothing was said as to amount. Izdebski said, "Give us a show in," but witness did not know what was referred to. That was all that passed. The Mint Syndicate was not mentioned. Witness had already provided for the £80 call, and paid it on August 17. Witness wanted assistance in case they had to purchase rights from the Herbert Sovereign Syndicate. Witness's business was flourishing. The profit the last year was something over £1,000, the takings would be about £3,000. Witness saw Blacking and Izdebski on Tuesday, August 20. Blacking first spoke of the assays, and then asked witness what further call had been made at the meeting. Witness said no call had been made beyond what witness was able to meet. Witness asked Blacking if he had seen the article in the "Diamond-fields Advertiser." Blacking said he had not, and asked witness if he would sell a quarter-share in the Mint Syndicate for the £120 witness owed him. Witness refused. Witness had not conversed with Blacking since. Witness saw Izdebski on the 20th after Blacking left. Izdebski said, "What about the half-share you promised us?" Witness said, "I promised no half-share to anyone." Izdebski said, "You are not going to back out of it." Witness said, "I will not be bounced by anyone." Izdebski then replied, "I am going to have a fight for my quarter-share," and then left. Witness heard no more until he received the letter from Messrs. Cochrane.

By the Court: Witness and Blacking parted good friends. Witness had no difficulty in meeting the promissory note. Blacking offered to purchase a quarter-share for the £120. Witness was afterwards offered £750 for a quarter-share.

Cross-examined by Mr. Schreiner, Q.C.: The call was made on August 16, and fixed at £80. Witness wanted money in case the Mint Syndicate should decide to purchase rights from the Herbert Sovereign Syndicate, the capital of which was about £2,500. At the meeting held on 16th August, Mr. Coghlan was present. He could not remember Mr. Attwell saying he had passed over to the Mint Syndicate all the rights which would be required. He remembered Attwell saying something to this effect. Witness was quite sure the conversation mentioned by Blacking and Izdebski did not take place.

Re-examined: Witness was not in want of assistance to pay the call. He had no other debts except in connection with his business. Witness was sure the meeting with Blacking took place on August 17. The probability of having to pay more than the £80 was discussed previous to the meeting of the syndicate. Witness never mentioned the Mint Syndicate to Blacking and Izdebski. The members of the syndicate were anxious to keep the affair as quiet as possible. On August 17 witness understood the syndicate was quite a private affair, and no shares were sold at that date that he was aware of. Mr. Blacking gave him a cheque for £20 for expenses of going to Bechuanaland on August 10.

By the Court: The meeting of the syndicate on August 16 was held about four o'clock in the afternoon. The minutes were kept in writing. On August 17 plaintiffs came to witness about eleven o'clock. The meeting of the syndicate on August 17 was held at about noon. Witness had not a copy of the minutes to produce. He knew of no ground for plaintiffs' contention.

Harry Haycroft, of Woodstock, father-in-law of defendant, said he was staying with Mr. Gasson the latter part of last August. On Saturday, August 11, he remembered Blacking and Izdebski coming to the house. Witness did not know the object of their visit; but he knew a dispute had arisen.

The defendant (recalled) said he could not remember two ladies coming into the shop when Blacking left witness.

This closed the case for the defence.

After argument,

Mr. Searle said if the case were postponed there were three witnesses who could speak definitely as to dates.

The Chief Justice: Would it not be possible to get copies of the minutes of the two meetings of the Mint Syndicate?

Mr. Schreiner admitted that the call was fixed on the 16th August.

The Chief Justice said: The Court will state on Wednesday whether it is necessary for fresh evidence or not.

Postea (12th February).

The Chief Justice said: In this case we do not consider it necessary to call for further evidence. This is an action for damages for breach of contract. The plaintiffs claim damages on the ground that on the 16th August, according to the amended declaration, they had bought half a share in the Mint Syndicate from the defendant for £80. Their evidence shows that on the 16th August, they went to the defendant's shop with quite another object—the object being to consult as to the assays of certain pieces of quartz which the defendant brought with him from Bechuanaland. After they had been conversing on the subject, a casual conversation took place, and I may read what each of the plaintiffs said. According to Blacking: defendant said, "By-the-bye, they are going to have a meeting of the Mint Syndicate this afternoon, Murphy and Attwell are the original members." He said the meeting was to make a further call and he was not prepared to draw further money out of his business. He said, "If you like to pay the call I will let you have a half-share." I said 'All right, let me know what the call is and I will send you a cheque." Izdebski said, How shall I come in? I said, "If you stand in with me I will go halves with you." Gasson said, "All right, I will be very glad; I will go to the meeting and be prepared to pay the call." That was the casual conversation that took place. Izdebski's evidence is substantially the same except that Blacking is supposed to have said, "Let me know what the call is and I will send you a cheque" at the end of the conversation. Now the defendant gives a totally different account as to what took place, and I am bound to say at once that the defendant in my opinion has not given his evidence in a perfectly straightforward or candid manner. At the same time I am not prepared to say that I disbelieve the whole of his evidence. I am inclined to believe that really this is what took place. That the defendant thought that the call might be more than he could spare from his business, and he said, "In case the call should be more than I can spare, will you pay the call, and I will sell you the half-share." I believe that is what took place, and it approaches very closely to what the plaintiffs themselves say. Now, the defendant, believing that this statement might compromise him, went very much further than he ought to have done, and said nothing whatever was said as to the selling of the share. I cannot credit that. I believe something was said about selling the share conditionally on defendant requiring the money, and not being able to spare it from his business. The plaintiffs put their own construction upon what took place, but I do not think they laid sufficient stress upon the circumstance that it was to be conditional upon defendant not being able to spare the call from money in his business. In my opinion, it was intended that the parties should come together again, and that after the call had been made, defendant would be prepared to say what he would sell the half-share for, and the other side what they would be prepared to pay. If the plaintiffs' version was correct there was no limit to the amount of the call. Defendant himself was to be one of those who had to decide upon the amount of the call, and the defendant, along with his co-proprietors with influence at the meeting, might have insisted upon a very heavy call being made. It would not matter to him, somebody else would have to pay it. I cannot believe the plaintiffs ever intended to make themselves liable for unlimited liability. If a heavy call had been made, and an action brought against the plaintiffs, I think they would have had a fair defence under the circumstances. It is quite true that according to Roman-Dutch law, as well as Roman law, at the time when a contract of sale is entered upon, the price may be left to the decision of a third party, and if in this case it had been perfectly clear that all sides understood that this meeting was to fix the price, then I think the defendant would be liable, but I do not so read the evidence, taken as a whole, because in every contract of this kind there ought to be some degree of deliberation. Where the contract is in writing that very fact shows deliberation. Here the parties come together, not for the purpose of this contract, but as a mere by-the-bye this matter is mentioned. Defendant might not have understood at the time from this casual conversation that he was to be held bound by this. Suppose plaintiffs had said to defendant. "Very well now, Gasson, let us have it in writing?" I am satisfied Gasson would have said, "Oh, no, this is merely a casual conversation; I am not to be rushed in

this way. Let us see the amount of call, and whether I am able to pay it." It appears, too, that Mr. Blacking previously had a case in the High Court, when he was specially advised to have contracts of this kind in writing. Then there are other circumstances which the Court cannot lose sight of. It is not clear that the alleged contract did take place on August 16, and that the subsequent meeting was on the Monday, and not the Tuesday. On the 17th August we find the defendant sending a cheque for £80 to pay the call, so that he clearly intended to repudiate the alleged contract. It is said, however, that he might have intended to get the money back from the plaintiffs, but that was not the arrangement, according to the plaintiffs' evidence, which stated that a cheque was to be sent by Mr. Blacking, the defendant, to pay the call. Looking at the defendant's bank-book, I find that there was £20 to his credit, after paying the call of £80, showing clearly that he was not so much in want of money that he could not pay this call. The defendant, however, might have thought, if there is a very heavy call to be made, I may not be able to meet it, and I may be glad to get some money from the plaintiffs. As to Izdebski, according to plaintiffs' own evidence, the contract was not made with him; it was an arrangement on the part of Blacking to let Izdebski come in with him for one-half of the interest which he purchased from the defendant. Then again, what took place on the Tuesday, when Blacking knew that defendant intended to repudiate the alleged contract? Blacking offered to give up the £120 promissory note. That looks as if Blacking had serious doubts as to whether there was a contract for the £80. He held out this inducement to the defendant in order to fix him with the contract. It had been arranged that the bill of £120 was to be renewed from time to time. Blacking admits that defendant was doing a good business. Therefore, looking at all the circumstances, and giving every credit to the plaintiffs for a desire to give their evidence fairly, and at the same time allowing that the defendant did not appear to give his evidence with perfect candour—I have not said anything which might lead to the thought that I impute untruths—still I do not think the defendant can be fixed with this liability. The evidence does not show that the alleged contract was entered into with perfect deliberation. The plaintiffs had full opportunity to have the alleged contract put into writing. They failed to do so, and I am not satisfied there was a binding contract for the sale entered into between the parties on the 16th August. At the same time the Court is of opinion that the defendant has not given his evidence with perfect candour, and the best way to mark the Court's displeasure is not to give him his expenses. There will be absolution from the instance with costs.

Mr. Justice Buchanan: I concur. The conclusion I have come to is that there was not a complete but an inchoate agreement. The only doubt in my mind was created by the defendant himself. The defendant wished the Court to understand that the conversation as to money was for the purpose of obtaining general assistance, and not for the special purpose of entering into negotiations for the sale of part of the share. I am satisfied that defendant's account is altogether erroneous; that the conversation was not for assistance, but for negotiating for the sale of the half-share. Looking at the plaintiffs' evidence, however, I have come to the conclusion that there is not such a complete contract as could be enforced in court. I quite concur in refusing the defendant his expenses.

Mr. Justice Maasdorp: I concur. It is only necessary in this case to look at the terms of the contract as alleged by the plaintiffs themselves; and I have come to the conclusion that there was no complete contract between the parties. As to the price, it was stated that this was to depend upon the amount of the next call to be made. I think, too, that the doubt which existed in the minds of the plaintiffs as to when the conversation took place shows that they were not clear as to when or how the conversation did take place. They fixed Saturday, the 17th August, but on the terms of the contract it could not possibly have taken place on that day. I further state my own conclusion that even in their own minds the plaintiffs did not believe there was any complete contract.

Mr. Schreiner, Q.C., asked the Court to make no order as to costs.

Mr. Searle, Q.C., contended that the costs of the application for removal of the case to Kimberley should be costs in the cause.

The Chief Justice: As to the costs of the application for removal of the case to Kimberley, defendant was unsuccessful, and I think the ordinary rule ought to be followed now that the unsuccessful party pay the costs. Although the plaintiffs fail in the trial they are not to be blamed for having brought the action to this Court instead of Kimberley. The costs of the trial, I think, ought to be paid by the plaintiffs, except the defendant's witnesses' expenses.

Mr. Justice Buchanan: I think the usual rule ought to be followed in both cases,

The Chief Justice: Then the order will be this: Absolution from the instance with costs, except the costs of application for removal, which are to be paid by the defendant; the defendant is not to have his expenses as a witness.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

BERHARDIEN V. INTILLAH. 1896. Feb. 12th. ,, 13th. ,, 14th. ,, 17th.

Malay mosque—Appointment of Imaum—Rights of Congregation—Procedure—Costs.

G. *an Imaum of a Malay Mosque in Cape Town, purposing to leave for Mecca, appointed three gatieps to supervise matters in his absence, and subsequently prior to his departure drew up a document nominating* B., *one of these gatieps, as his successor in the office of Imaum.*

On the death of G. *meetings of the congregation were held for the purpose of electing an Imaum, as both the genuineness and the validity of the document nominating* B. *were questioned, and both* B. *and* I. *claimed to have been properly elected thereat.*

The evidence being very conflicting as to the actual result of the election the Court, to test the wishes of the congregation, requested the Registrar to take a poll of the members of the congregation who were such at the date of the election meetings, in order to ascertain how they had voted: the poll resulting in a great majority for B.

Held, *that under the circumstances generally* B. *was the duly appointed Imaum.*

Held further, *that a delay in bringing the action having been due solely to the legal advisers and no real prejudice having been caused thereby to the defendant, the plaintiff was entitled to his costs.*

Jan v. Ismael (5 Searle, 102) *approved.*

This was an action instituted by Imaum Machamat Berhardien against Intillah.

Both the parties are members of the congregation of the Mohammedan Church, situated at the corner of Church and Chiappini-streets, Cape Town.

The declaration alleged that on the 26th April, 1895, one Imaum Gasiep, who was at that date the duly appointed Imaum of the said church, died, having previously, on the 15th November, 1894, nominated the plaintiff to succeed him as Imaum of the said church.

That thereafter, on the 16th June, 1895, the plaintiff was duly elected Imaum of the said church, and forthwith proceeded to perform his duties as such Imaum. That thereafter, on the 25th June, 1895, the defendant wrongfully and unlawfully took possession of the key of the said church, and wrongfully and unlawfully claimed to be the Imaum of the said church, and prevented the plaintiff from having access to the said church and from performing his duties as Imaum.

The plaintiff prayed:

(*a*) An order declaring him to be the duly elected Imaum of the said church.

(*b*) An order restraining the defendant from interfering with him in the performance of his duties as Imaum of the said church.

(*c*) Alternative relief and costs.

The defendant, in his plea, admitted the formal allegations in the declaration and that Imaum Gasiep, who was the duly appointed Imaum of the church, was dead. He denied that the plaintiff was a member of the congregation, and he denied every other allegation in the declaration.

He specially pleaded that Imaum Gasiep, being about to leave for Mecca in December, 1894, it became necessary, in accordance with the laws and customs of the Mahommedan Church, to appoint an Imaum to act for the said Gasiep, and to appoint a successor to the said Gasiep in case he should die, and on the 23rd December, 1894, at a duly and lawfully assembled meeting of the congregation of the said church, convened by the said Gasiep, and at which the plaintiff was present, the defendant was duly appointed and elected Imaum during the absence of the said Gasiep, and as his successor in the case of his death, and on the said date and in the presence of the said congregation, the said Gasiep handed the key of the said church to the defendant, and thereafter handed to him the books and papers belonging to the said church, of which the plaintiff was aware.

The said Gasiep left this colony on the 26th December, 1894, whereupon the defendant performed the duties of Imaum, and has continued to do so up to the present time, he, upon the death of the said Gasiep, becoming the Imaum of the said church.

He denied that he ever prevented the plaintiff from having access to the church as a member, but he said that in June, 1895, the plaintiff was

duly and properly expelled from the congregation as a member thereof, since which date he has not been a member, and has not worshipped in the said church.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Graham and Mr. Watermeyer appeared for the plaintiff.

Mr. Juta, Q.C., and Mr. Moltena for the defendant.

Machamat Berhardien, the plaintiff, said that he was a member of the congregation of the mosque at the corner of Church and Chiappini-streets. He had been a member from his youth upwards. His father was a helal of the church. Witness was a gatiep before the application to the Supreme Court, made in June, 1891. After that witness was preaching in the church, and continued for a whole year alone. Then he was ill. During witness's illness his brother and Abdol Gabiar preached. Abdol was not a member of the congregation. Witness was ill for two months, after which he resumed preaching until the talk arose among the congregation, when the Imaum called the congregation together, and he was suspended for a month; a charge about a girl was brought against him. Witness was afterwards made an Imaum—in June, 1895. Witness preached in Arabic, never in Dutch. Some of the congregation understood him.

By the Court: Why don't you preach in Dutch

Witness explained that the preaching must be in Arabic. A portion of the Koran was read out and explained.

Witness also preached from a book of sermons. He was able to read the Koran. It was necessary that an Imaum should be able to do this Gasiep preached until he lost his eyesight. The Imaum must preach; and he had the power to appoint another. Intillah was not qualified to read the Koran from end to end, and he never preached. The document produced was written by Mr. De Villiers shortly before Gasiep went to Mecca. It was an appointment made by Gasiep, who went to Mecca in 1894, a few days after Christmas. Previously a meeting of the congregation was held. A fair number attended. Abdol Gasiep said he was going to Mecca, and said things would remain as he had arranged, and witness and his brother were to be the preachers. Intillah was to supervise. Abdol Gabiar was to assist as a preacher. It was stated that there was a debt on the church, and the old man Abdol Gasiep said, "I won't bother myself about a transfer; those who want it can fetch it." If one Imaum goes to Mecca it is not necessary to appoint an Imaum; the gatieps had to see to it. Old Gasiep said nothing as to resigning as Imaum. A new Imaum could not be appointed until the old one had died: two could not hold office at the same time. After old Gasiep went away Intillah helped to look after matters. Witness performed some of the duties of Imaum after Gasiep's departure. Witness assisted in the burial of the dead. Intillah also did some of the duties of an Imaum. Witness took instructions from Intillah. After Gasiep went away the transfer was fetched by Intillah. Afterwards a letter was sent to young Gasiep, announcing the death of his father. Witness first heard of Abdol Gasiep's death in June. A meeting was called at the church by the defendant. It was on a Sunday. Witness was present, and there was a fairly representative meeting. Intillah, after announcing the death, said, "We shall now have to appoint an Imaum." Abdol Gasiep's son then produced a document, which was read out in English and Dutch, and then those present appointed witness the Imaum. The majority stood up and held up their hands. Not many remained sitting—perhaps ten. About sixty arose. Then witness got up and the congregation sat down. Witness said, "Do you make me your Imaum?" And the reply was, "We make you Imaum." Witness then said a prayer and the people congratulated him. Witness put a notice in the "Cape Times" on the 19th June to the effect that witness had been appointed Imaum. No key was produced at the meeting on 23rd December, 1894. After he had been appointed Imaum he was prevented from going into the church. There was a case for assault before the Magistrate, which witness lost. Witness did not afterwards attend the church, being afraid of quarrels. Witness never got any notice that he was expelled from the church.

Cross-examined by Mr. Juta, Q.C.: The Imaum generally buries people but sometimes sends others. It is the Imaum's duty also to marry people and to make the returns of births, deaths, &c. Intillah sent in the returns of burials to the Town-house. There were three gatieps when Gasiep went to Mecca. He was not expelled because, seeing Intillah entering the pulpit, he (witness) rushed to the pulpit with his boots on.

Isaac Jeremiah de Villiers, a conveyancer in Mr. Villet's employ, said he wrote the document produced in plaintiff's house. Witness met Abdol Gasiep, who told him to come to plaintiff's house. Gasiep was sent for, and told him what to write. The dictation was in Dutch.

The document was read over to Gasiep, who understood it. The plaintiff did not interfere. Witness did not see the document signed or witnessed. He had done other work for Gasiep.

Cross-examined by Mr. Juta: Witness had not practised as a conveyancer on his own account. He had done work for the Malays the last ten years. He knew nothing of Gasiep's congregation. In November, 1894, he was in the employ of Le Sueur Brothers. Witness drew the document out of office hours, and he thought he was paid 7s. 6d. His employers debited his account with the price of the advertisement in the newspaper. Gasiep's house was close to plaintiff's. There would have been no difficulty in getting witnesses, but the majority of Malays cannot write. No one signed whilst witness was present.

By the Court: Gasiep told witness to write the document in the form shown. Gasiep went to find witnesses, but returned, and said, "Never mind, I'll get them afterwards."

F. Jurgen said that he witnessed the documents at Gasiep's house in November, 1894.

Mahomet Gasiep said the late Imaum, Abdol Gasiep, was his father. The document produced was signed by witness as a witness to the mark of his father. His father understood the document. Witness also understood it. [Witness then read the document appointing the plaintiff Imaum after old Gasiep's death.] Witness remembered his father going to Mecca. Previous to this a church meeting was held, when the plaintiff, defendant, and another were appointed to do the work. Nothing was said at the meeting about appointing another Imaum. The keys were at the house of the woman who kept them. Witness heard of his father's death. Witness was present at a meeting of the church last June. The meeting was called by Intillah, who pronounced a prayer and announced the death of the Imaum. He said another Imaum must be appointed. Witness's brother took out the document (produced) which was read to the congregation both in English and Dutch. A member of the congregation said it was a false paper. Between fifty and sixty put up their hands for the election of the plaintiff as Imaum, and only about ten did not do so. The plaintiff pronounced a prayer and he was afterwards congratulated on his election. Plaintiff had frequently preached in the church.

Cross-examined by Mr. Juta, Q.C.: Witness left the church last June, and had since been attending service at plaintiff's house. Many of the congregation attended. Witness's father could write Arabic very well, but would not allow witness to see him do it. His father used to sign his name in Arabic. Letters were sent by his father from Zanzibar and Mecca to his brother: they were written, he believed, by his brother's sister, who went with his father. Intillah buried his mother, and witness himself went to the Town-house to give notice of her death.

By the Court: The congregation did not know when they attended the church in June, 1895, that an Imaum was to be appointed.

At this stage,

The Chief Justice asked if the parties could not agree upon the list of members of the congregation in June, 1895.

Mr. Graham thought this might be arranged.

The Chief Justice: We may hear the whole evidence and then be no further on. The parties might come before the Court to-morrow morning and agree upon the members of the congregation in June, 1895.

Counsel promised to endeavour to arrange this.

Postea (February 18th).

Mr. Graham said the parties had failed in their efforts to come to any arrangement as to a list of the congregation, although the list put in of the congregation during old Gasiep's lifetime was agreed upon by both parties as a *bonâ-fide* list. Defendant however handed in a list; a large proportion of the names however were not those of members of the congregation of this mosque.

The Chief Justice: What constitutes membership of a congregation?

Mr. Graham said persons desiring to be members came to an Imaum and expressed that desire; after which they regularly worshipped at that mosque and took part in the election of officers. Members contributed something towards the expenses of the church, but there was no definite ceremony. Imaums could pick out a man as being a member of their congregation.

The Chief Justice: According to the true Mohammedan faith, a Moslem is entitled to worship in any mosque.

Mr. Graham: That is so; but they all have their own definite congregation.

The Chief Justice: Is there no record kept of a person joining as a member and the date on which he joins?

Mr. Graham said that after the case was decided in old Gasiep's favour in 1891, a list of members, containing about 170 names, was drawn up. Since then about thirty had been struck off through death and other causes. He had only one other suggestion to make, and that was to appoint a commissioner to take evidence as to membership.

The Chief Justice: But Mr. Juta will say: You are the plaintiff, and you must prove that your client has been elected.

Mr. Graham said they had done all they could to agree upon a list of members. Immediately after the dispute the plaintiff offered to stand by re-election as suggested by his lordship, and this was refused.

The Chief Justice: The onus lies on you to prove the election of the plaintiff.

Mr. Juta said that every endeavour had been made to meet the Court's suggestion because they were as confident of an election as they could be.

The Chief Justice: The Court only made the suggestion for the sake of peace. These mosques were all quarrelling, and there seemed to be no educated person amongst them to see things properly done.

The hearing of the case then proceeded. General evidence was given by a large number of witnesses as to the facts of the meeting in June, to the effect that the election was quiet and orderly, that the meeting was called to elect an Imaum, that the paper signed by Gasiep was read, and as some declared it was false it was decided to have an election; that immediately after the election the key of the mosque was given to Berhardien though subsequently Intillah acquired possession.

They further alleged that at a meeting in December before Gasiep left he appointed three gatieps to do the work but no Imaum was elected; that about 160 members were called to the meeting in June but that only 60 appeared; that only seven or eight voted for Intillah, and that Berhardien performed the work after his election.

Hadji Moosa, *alias* Moos Madi, a belal of the church, said Intillah was the oldest of the three gatieps. Generally a gatiep was elected Imaum, not the oldest but the best one. Witness thought plaintiff the most suitable man as Imaum; plaintiff had done the chief work. Both plaintiff and defendant had been to Mecca.

Gazant Jakoet said he was a belal. He could not say whether the people who voted for Berhardien went to church now. Many were present in court.

At this stage the Chief Justice asked those in court who had voted for Berhardien on the 16th June last to put up their hands, with the result that over thirty hands went up. A count was taken of those who voted for Intillah, when about a dozen put up their hands.

The Chief Justice explained that this step was taken merely to shorten Mr. Juta's cross-examination.

Coenrad Christian Silberbauer, attorney for the plaintiff in this case, said his first instructions were received in July last, and from that time onwards plaintiff had been urging him to press on with the proceedings. There had been delays, but these delays did not rest with the plaintiff.

Cross-examined by Mr. Juta, Q.C.: There were no specific instructions to issue the summons, but generally to proceed with the case. It was too soon for the August term, then something intervened to prevent its being brought on in November term. There was a doubt as to whether the action should be brought by the congregation or by the plaintiff, and the consideration of this matter caused delay.

By the Court: Witness took the whole responsibility of the delay.

This closed the case for the plaintiff.

For the defence,

George B. Williams, A.R.M., Cape Town, produced the records in the assault case tried in July against Berhardien, the plaintiff.

Galiep Rajah said he helped to build the church and was a member of the congregation. On an Imaum going to Mecca the custom was for him to appoint a deputy, who would become Imaum in the event of pilgrim's death. At the meeting in December Gasiep appointed the defendant as his deputy. Defendant had performed the duties of Imaum.

Postea (February 14th).

On the hearing of this case being resumed,

Mr. Juta, Q.C., stated that to-day was the greatest feast and festival amongst the Malay community, and that the services throughout the mosques would begin at 11.30 and continue until two p.m. Would it be convenient for the Court to take the motions standing over in that interval?

The Chief Justice: Some of the witnesses might absent themselves, leaving four or five witnesses spared from the festival to give their evidence.

Evidence for the defence continued.

Gatiep Rajah said he remembered the meeting in June. There was a number of people present, Gatiep Ibrahim and others were there. He could not remember the names of all those who were present. Intillah announced to the congregation that the Imaum was dead. Mahomet Abiet took out a paper and gave it to Lodewyk to read. Lodewyk read it and said that Gasiep had made Berhardien the Imaum. Witness asked, "Who's that? I cannot believe Gasiep would make a paper like this." Witness asked to look at the paper. Some called out for Berhardien, some called out for Intillah. Witness said he

had never known an Imaum appointed like that. The people were excited. Witness got up and went out. There was no election before he left. Witness left because he did not like the row. The meeting was not called to elect an Imaum. Witness did not attend any meeting after that held on the Sunday. Witness was one of the Gatieps who signed the notice which was put in the "Cape Times." Witness did not attend the services at the mosque for some time, because he had a sore foot and could not go. Witness now attended the services and could recognise the same people as were there before. The people in the mosque were now quite satisfied with Intillah.

Cross-examined by Mr. Graham: His mother's name was Samia, and his father-in-law was Terefa. Witness had no chapel in Dorp-street, but held prayers there. Every priest had his belals and gatieps. Witness did not consider himself under Imaum Gasiep, but with him. Every gatiep could appoint his own belals and marabouts. Each gatiep had a little conventicle of his own. Witness knew Intillah very well. There could not be two Imaums alive in one church at the same time. Gasiep did not resign before going to Mecca; he was Imaum until he died. At the meeting Gasiep handed no papers to Intillah. Witness went with Intillah to Hadji Sali's at Claremont to get the transfer. Sali said, "We have not got the transfer here; you must go to Mr. Berrangé. There is £18 debt on the transfer." Witness said, "I have got the money here." Intillah contributed money, and there was a general collection. Nothing was said before old Gasiep went away as to the three gatieps acting in his absence. The congregation would have respected Gasiep's wishes. At the meeting in June witness said, "Old Gasiep would not make this document." Witness had heard Intillah preach once after the quarrel. Before the quarrel he had not heard Intillah. Intillah was as good a preacher as Berhardien. Witness did not understand Arabic. Witness heard of Gasiep's death. He felt certain nobody else could take Gasiep's place but Intillah. Intillah became Imaum because Gasiep appointed him deputy before he left for Mecca. Had Gasiep lived and returned Intillah would have said, "You placed me in this position, here is your place back again." Supposing the document was really signed by old Gasiep, witness did not know that it would make Berhardien Imaum.

Re-examined: It was usual for an Imaum to appoint a deputy before going to Mecca. Gasiep handed over the books to Intillah.

By the Court: At the meeting in June witness heard Berhardien say, "Do you take me for your Imaum?" Some said "Yes," others said "No," and there was confusion. He could not say whom the majority voted for.

Genhardien, one of the marabouts, and also the sexton of the church, said he had been in the church thirty-three years. Witness called the meetings in Gasiep's time. Gasiep was the same as a father to him. Witness called the December meetings, but did not tell the people any object of the meetings. The Bishop came and made a prayer. Gasiep said he appointed Intillah in his place. Intillah said, "What do all the people say?" The people said, "All right." Gasiep gave witness the key when he went away, and told him to hand it to Intillah when he got tired of it. At the meeting in June Abiet took the paper out of his pocket, and it was read. Afterwards the church was upside down, and witness did not know where he was. Abiet wanted to quarrel with him. The church was like a canteen. Witness then left the church, and the people were still talking. Cassim gave the key to Berhardien, and he took it to Rebecca James. He called the people together for a meeting on the Tuesday night following the Sunday's meeting. The church was crowded. Some were strangers, but the old congregation was there. Berhardien was there, and said a prayer, after which he walked out. Intillah asked him to stay, but he would not do so. The people said, "Imaum, we have put Berhardien out altogether. He is no longer in the church." Since then Intillah had been acting in the church, and there had been peace and quietness.

Cross-examined by Mr. Graham: The meeting called for Sunday was only to hear Intillah tell the congregation that Gasiep was really dead. Nothing was said as to the election of a gatiep. Witness saw Gasiep hand the key to Intillah. He had been tried for perjury, but was acquitted. There was a big row in the church. Witness left; when he came back he heard that Berliardien had been elected Imaum.

Intillah, the defendant, said he had been carrying on the services at the mosque during the whole of last year. Witness was one of the original builders of the church, and had been a member since it was built. He was first a marabout and afterwards the oldest gatiep under Gasiep. Before Gasiep went to Mecca he appointed witness his deputy. That was at the meeting on December 23, 1894. Gasiep said, "People, I am going to Mecca, and I put Intillah in my place." The congregation all assented Berhardien included. And then the old bishop touched witness on the shoulder and said, "Imaum!" three times. Witness was a gatiep when Berhardien was a child. Since June the

people had been worshipping in the church, and all was quiet and peaceable. Witness had created no new gatieps. The majority of the people who were in the church on the Sunday in June are members of the congregation now; and there had been no disturbance in the church since Berhardien left. On the following Tuesday evening Berhardien was expelled from the church. Witness was present, and the usual congregation was there. Berhardien came in afterwards and pulled off his coat and said, "I am the Imaum," and created a disturbance. Witness did not remember Berhardien coming into the church with his boots on. On Sunday, the 23rd June, Berhardien came in, and nearly ran over witness. Afterwards witness finished the service. Witness then gave the order that if Berhardien came again he was not to be let into the church.

Cross-examined by Mr. Graham: At the meeting in December witness remembered the collection. He got the transfers on the Monday following. He got them from Mr. Berrangé, and took them to Gasiep's house, and Gasiep gave them to him. The meeting in June was called to inform the congregation of Gasiep's death.

The Chief Justice: The Court has seen enough of the case to know that there will be great difficulty in arriving at a decision as to which party has been properly elected without ascertaining the wishes of the congregation; and the Court has asked Mr. Tennant to sit in court to-morrow, and to request the members of the congregation who were present at the meeting on the 16th June to attend the court, and to come up one by one and tell Mr. Tennant whom they support. The original list will be taken as the basis, but, of course, anyone else who can satisfy the Registrar that he was a member of the church on June 16, and of that church only, and can satisfactorily explain why he was not at that meeting will be allowed to give his vote. The report of the Registrar will not necessarily be conclusive, but it will be of some assistance to the Court, in addition to the evidence, to decide which really has a majority of the congregation.

Counsel for plaintiff and defendant assented to this course.

Hadji Imaram said that from the time Gasiep went away, up to the present time, Intillah had been in charge, and they recognised him as the Imaum.

Semai, a belal from the the time of Gasiep, supported Intillah because he was an old man.

Sheik Mohamet Telet said he was a bishop of the Mohammedan Church. It was usual when an Imaum left for Mecca for him to appoint an Imaum Moota, or young Imaum, who was generally the oldest gatiep. If the pilgrim died the Imaum called by the old man is Imaum. He could not say Berhardien is anything but a good man. So is Intillah.

By the Court: Gasiep was not a learned man. He was the same as Intillah.

Postea (February 17th).

Following the instructions of the Court given on Friday last, the Registrar reported as follows:

In compliance with the Court's direction given yesterday, a meeting, presided over by the Registrar, was this day held in the Court-room to ascertain from those members of the late Imaum Gasiep's congregation who were present at a meeting on the 16th June last year how they voted for Imaum, and to accept votes from those members of the church who were not then present, and who are able satisfactorily to explain their absence on that occasion.

The original list was taken as the basis.

The voting resulted in a majority of 49 for Berhardien.

Analysis of original list:

Members, 177; of these 35 are absent from town, 15 are dead, 9 have joined other congregations, 2 have left the Colony, leaving 116, accounted for as follows: Voted for Berhardien 93, for Intillah 24—117; deduct Belal Dont, who voted on both sides, 116: not on list voted, 19; total number voted, 135.

Votes for Berhardien—On 16th June, 1895, 49 on list; February 15, 1896, 44; total, 93.

Votes for Intillah—On 16th June, 1895, 10 on list; February 15, 1896, 14 on list; June 16, 1895, 6 not on list; February 15, 1896, 13 not on list; total, 43.

General Results—For Berhardien, 93; for Intillah, 43; majority for Berhardien, 50. This result includes, however, Belal Dont's votes for both sides. Taking his last vote in favour of Intillah the final result is:

For Berhardien...	92
Intillah	43
Majority for Berhardien	49

H. TENNANT, Registrar.

February 15, 1896.

The Chief Justice: What do you propose to do, Mr. Juta?

Mr. Juta replied that he had one or two more witnesses to call. The report showed very bad electioneering on the part of his client. He drew attention to the value of the list as shown by the vote.

The Chief Justice: Better call your witnesses.

Machamat Jobier, gatiep in defendant's mosque, said that since Gasiep left for Mecca Intillah had acted as Imaum; and since June he

had been recognised as Imaum of the church. Witness did not attend the meeting in June because he was sick.

Other witnesses gave evidence corroborative of the allegations that Intillah had been properly elected Imaum after Gasiep left, and that he had since done all the work.

The case for the defence was then closed.

Mr. Graham was not called upon.

Mr. Juta for defendant: The plaintiff relies largely on the list of members of Gasiep's congregation supposed to have been drawn up by Gasiep; also on the document in which, as it is alleged Gasiep appoints Berhardien as his successor. But as to the list of members, there are very important omissions, notably of the name of one Ibrahim, who was a well-acknowledged member of Gasiep's congregation.

Court: The list was only used as a basis; no one was excluded from the poll on Saturday before the Registrar merely because he was not on the list.

Mr. Juta: But such omissions are significant. For the foundation of plaintiff's case is the list, and it is produced by plaintiff who alone knows of its having been drawn up—it being very extraordinary that Gasiep should draw up such a list secretly with Berhardien without telling any of the officials or members of the congregation. It is moreover written in English, though Gasiep understood Arabic perfectly well. Moreover, all swear that Imaums never keep such a list. As to the document appointing Berhardien as successor to Gasiep, the latter is supposed to have drawn up this again (without telling any of the officials or members) just like the list, secretly with Berhardien. But Berhardien says nothing about it even on occasions when it would have been most useful; in fact, after Gasiep's death is known he says nothing about it, and it is left for some one to find it by chance in a drawer attached to a copy of the will of Gasiep's wife.

But though it is alleged that on the 16th June Berhardien was elected Imaum yet Intillah has acted as Imaum ever since, and Berhardien has waited six months before proceeding to oust him. The fact that a couple of days after the meeting of 16th June Berhardien advertised that he had been elected, looks as if he were in doubt, and wanted to be first to claim that in the noisy shouting meeting he had been made Imaum.

Eliminating the result of his poll on Saturday there is nothing in Berhardien's favour but the doubtful document of appointment and list of members. As to the poll: Berhardien is wealthy, and, probably, a better electioneering man, and in any case the poll cannot decide what happened on 16th June, for at the poll about 140 votes were given; at the meeting there were not more than sixty or seventy present at the outside.

The Chief Justice said: The authorities are very obscure as to the manner in which Imaums are appointed in countries where the Mohammedan faith prevails; where the opinion is not unanimous, it appears that the religious authorities (who are also the judicial authorities in Mahommedan countries) had to decide as to the Imaum. The matter was very clearly stated by Mr. Justice Watermeyer in his judgment in the case of *Jan* v. *Ismaël* (5 Searle, 102). The unanimous opinion of the congregation would throughout Islam apparently make the Imaum. If there is a difference of opinion the legal authorities, they being also the religious authorities, must decide. The legal authorities here, who are not the religious authorities, cannot decide as to the superiority of one man over another in the recitation of the Koran, but they can decide where there is sufficient evidence before the Court whether a certain person alleged to be Imaum has been properly appointed by the congregation or not. As regards the practice in this colony there seems to be no difference between counsel. Both of them admit that the final appointment of Imaum rests with the congregation, and I understand them also to admit that in making this appointment the congregation would be to a great extent guided by the wishes of the deceased Imaum expressed in some genuine form. It is contended on behalf of the defendant that the wishes of the late Imaum Gasiep were expressed before he left for Mecca, and that on December 23, 1894, the congregation was called together, and that their deceased Imaum indicated the defendant as his successor, and that this indication was approved of by the congregation. That is the defendant's case. The plaintiff's case is that the deceased Imaum signed a document, attested by two witnesses, in which he indicated the plaintiff Berhardien as his successor, but he did not announce this to anyone except the persons immediately concerned in drawing up the document, that it was laid aside in a private drawer only to be opened on his death; and that when it was found that the late Imaum had really died a meeting of the congregation was held on June 16, 1895, when the document was produced before the congregation, and that thereupon the congregation confirmed the appointment of the plaintiff by a large majority. First of all as regards the defendant's evidence. As to the meeting on December 23, 1894, I do not think there was

anything in the nature of an appointment of an Imaum on that occasion. It is true that three persons were named by the late Imaum to perform his functions while he was away, and it is quite possible, and I think probable, that he intended the defendant Intillah, as the eldest of the three gatieps, should have precedence, and should have a greater share in the control of the mosque than the others; but I do not believe that there was any intention to appoint an Imaum on that occasion, or even to appoint an assistant or junior Imaum (Imaum Moota), as is alleged by the defendant. A letter has been produced, purporting to have been written by the deceased Imaum to the defendant while he was on his way to Mecca. The genuineness of that letter is not admitted, but even admitting it does not assist the defendant in this case, because he nowhere speaks of the defendant as Imaum, but calls him gatiep all through; and the whole tenour of that letter shows that he looked upon the defendant merely as the senior of the three gatieps left to control the affairs of the congregation, and it is noteworthy also that in his message to the gatieps he refers only to two other gatieps who were appointed with the defendant to control the affairs of the congregation. These three gatieps are the only three mentioned throughout this letter, and that I think fully confirms the statement made by the plaintiff. I think therefore there is no proof whatever that before the Imaum left there was any desire to appoint the defendant as Imaum. Well, then we come to the meeting on the 16th June. First of all in regard to the document, then produced, appointing Berhardien. I am perfectly satisfied as to its genuineness. There seems to me to be no reason whatever to believe that Mr. De Villiers swore falsely when he said that this document was drawn up on the 15th November, 1894, at the request of the Imaum himself. The document is in Mr. De Villiers's handwriting, and it was, he says, at the Imaum's request that the document was written out. Some doubt might be thrown on the signature of one of the witnesses, but as to Jurgens' signature there seems to be no doubt whatever as to the genuineness. He was a plumber, who happened to be working in the house, and he swears positively that he was asked to witness the document executed by the Imaum. The document, on the face of it, shows every sign of being perfectly genuine. Mr. Juta asks why this document was kept secret. The Imaum may have had many reasons for this. He may have wished that there should be no dispute during his lifetime, but that after his death it should become known that his clear wish was that Berhardien should succeed him. But that is not conclusive. It is still open for the congregation to select their own Imaum, and the question now is whether the congregation did approve of Berhardien or not. The meeting of 16th June was called by the defendant, and I am satisfied that he himself had announced through his marabouts that this meeting was to be for the election of an Imaum—in fact, he admitted it before the Magistrate—and he said there were only thirty persons present. Now that is untrue according to his own evidence in court here, and his own witnesses would say that double that number were present. Perhaps it was rather a noisy meeting, but whether noisy or not, the evidence satisfies me that there was a large majority in favour of the plaintiff, and that there were only about a dozen at the utmost that supported the defendant. The defendant being in that position was silent. At the Tuesday evening's meeting he says there were over 200 present, while only 15 members of the congregation are admitted. A very small minority of the persons present on that Tuesday appear to have belonged to the defendant's congregation at all, and at that big meeting he took proceedings to exclude the plaintiff. It is argued that the plaintiff shows by his conduct that he was not duly elected because he had not taken prompt steps to be reinstated as Imaum. The strongest evidence in favour of the defendant was the delay on the part of the plaintiff in insisting upon his election, but this delay is explained by Mr. Silberbauer. I think there was unnecessary delay on the part of his legal advisers. It is almost unintelligible why, with such a clear case as they submit they had, they did not apply for an interdict to restrain the defendant from carrying on the duties of Imaum. It appears to me that the plaintiff is a peaceably disposed man. I think the evidence before the Magistrate showed that he was hustled and pushed about in a very unseemly manner. On reading the evidence over, I am perfectly satisfied that there was very unseemly conduct in that case shown towards the plaintiff, and that the plaintiff showed great patience and forbearance; and my own explanation of his not going to church and asserting his rights is that he did not wish to have a disturbance, and that he wished to have the matter peaceably settled by a court of law instead of taking the law in his own hands. The evidence perfectly satisfies the Court that the plaintiff had the suffrages of a large majority of the congregation, and that he is the proper person who ought to be appointed Imaum, but in view of the importance of this matter to the congregation it was

thought advisable that some means should be devised for testing the wishes of the congregation and accordingly Mr. Tennant was requested to take the votes of the persons entitled to vote on the 16th June, and ascertain for whom they voted and for whom those who were absent would have voted on that day; and the Court is much indebted to Mr. Tennant for the way in which he has performed this duty. It is perfectly clear that the plaintiff has a large majority—more than two to one—two-thirds to one-third—amongst those who actually voted. The list kept by the last Imaum was taken as a basis for voting, but others were not excluded. Any persons who could prove that they belonged to that congregation and would have been entitled to vote on the 16th June were allowed to give their votes, and notwithstanding that there was this large majority. But now Mr. Juta says it is a mere matter of electioneering. That is generally the remark that a candidate makes when he has lost his seat. The defendant had as much opportunity of electioneering as the plaintiff, and every opportunity was given by the Registrar to persons to come and vote. It was also said that it being Saturday there was a difficulty in getting the people up. I do not think that would make a great difference in influencing the final result. The view the Court took on the evidence submitted is confirmed by the voting on Saturday. I trust now that the defendant having failed altogether will work in harmony with the congregation. He is still senior gatiep, and he must accept the decision of the Court. But if he does not accept it he must leave. The plaintiff will be declared Imaum of the mosque and entitled to the key of the church, and the defendant and all his people must be interdicted from in any way interfering with the plaintiff in the performance of his duty. The judgment of the Court will therefore be in terms of clauses A and B of the prayer of the declaration, with costs.

Mr. Justice Buchanan concurred. He thought it was a great pity there were not some educated persons connected with these mosques, so that the business done might be conducted in a more formal manner. Had there been a proper formal meeting in the mosque, and had the proceedings been conducted with the usual care and precision, that case would never have arisen at all. The Mohammedan community stands in a different position from what it does in a country where it forms a State Church. Since the case of *Jan* v. *Ismael*, one consistent principle had been laid down in all these cases: that there is no right of succession on the part of a senior gatiep; an Imaum has no right effectually to name his successor—it rests with the congregation to give their approval or disapproval of the act. The election in this case rested entirely with the congregation, and the Court ought to act on the express wish of the congregation, and according to previous decisions of the Court and declare the plaintiff Imaum of the church. He, therefore, concurred in the judgment.

Mr. Justice Maasdorp also concurred for the reasons already given for coming to that conclusion.

Mr. Juta asked for a revision of the order as to costs on the ground that the plaintiff had delayed in bringing the action. Had the plaintiff acted promptly part of these enormous costs would have been saved.

The Chief Justice: The Court might have given an interim order, but the case would have had to be decided by action. If the defendant had been prejudiced in any way by the delay, there might be something in it. But he was only prejudiced in that he had been for six months Imaum; and as to the costs, they would have been exactly the same if the action had been brought then as now. The plaintiff has succeeded in his action, and he must have his costs.

[Plaintiffs' Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. J. C. Berrangé & Son.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

WALKER'S EXECUTORS v. EKSTEEN'S EXECUTRIX. 1896. Feb. 13th.

Mr. Sheil moved for provisional sentence upon a mortgage bond for £192, together with interest at 6 per cent. from 1st July, 1895, less £5 paid on account, and asked that the property specially hypothecated should be declared executable.

Provisional sentence as prayed, with costs.

RADENHORST V. SMIT.

Mr. Sheil applied for provisional sentence on a promissory note for £56 11s. 6d., less £35 paid on account, with interest at 6 per cent. and costs.

Provisional sentence as prayed, with costs.

HEYDENRYCH V. LYNCH. { 1896. Feb. 13th.

Writ of arrest—Discharge—Insolvent—Suspectus Fugæ.

Where charges of fraudulent and culpable insolvency and of intention to abscond were made against an insolvent in an affidavit sworn to by a creditor, a judge in chambers ordered the insolvent to find bail in the sum of £250 to attend the meetings of his creditors, or failing bail to be arrested.

The insolvent being unable to find bail was arrested.

On the return day of the writ of arrest the insolvent appeared and denied on oath the allegations in the creditor's affidavit and as the creditor was not present to give evidence in support of his affidavit the writ of arrest was discharged.

This was an application for confirmation of a writ of arrest granted by the Chief Justice on the 8th inst.

The affidavit on which the order was granted alleged that the deponent's firm were creditors in the sum of £150 of the insolvent estate of Henry Wallis Lynch, whose estate was accepted on the 6th February, 1896, by the Court as insolvent.

That the insolvent committed an act of fraudulent insolvency by having removed certain sums of money to the value of some hundred pounds, and also that he contracted fraudulently the amount which he owed the deponent's firm by stating that he was a man of means outside his business.

That he had also committed the act of culpable insolvency by contracting debts a few days before the notice of his intention to surrender appeared in the "Government Gazette" and that thereafter he contracted further debts without any reasonable or probable expectation at the time of contracting same of being able to pay the same.

That according to the "Government Gazette" of the 7th inst., the first meeting of the estate would be held on the 14th inst.

That the deponent had been informed and verily believed that the insolvent intended to depart from the Colony, and that it would therefore be necessary to obtain an order from the Court authorising the Sheriff to arrest the insolvent or give such security as might seem to him advisable to protect the creditors.

That deponent's firm was the largest creditor in the estate, and that it would be to the interest of his firm to have the insolvent arrested or security given.

After hearing this affidavit the Chief Justice made the following order in chambers:

It is ordered that the respondent give bail in the sum of £250 to the satisfaction of the High Sheriff, or his Deputy, to appear at all meetings of his insolvent estate which he may be lawfully called upon to attend, and, failing such bail, that the said Sheriff or his Deputy is hereby authorised to arrest the said respondent and keep him in custody until he shall be discharged by order of Court, the writ of arrest to be returnable on Thursday the 15th day of February instant, with leave to respondent to move in the meantime for the discharge of this order. The affidavit upon which this application is granted to be served upon the respondent.

The bail not being found the respondent was arrested.

Mr. Sheil now moved for confirmation of the writ of arrest.

The insolvent Henry Willis Lynch, on oath, said he had never any intention of leaving the Colony, and had given no reason to the petitioner for him to suppose so. He was quite prepared to attend the meetings of his creditors. He had not taken £100 from his business. He became aware of his insolvency about the middle of January, and gave notice of his intention to surrender about the end of that month. Between giving this notice and the acceptance of his estate he purchased other goods, which he paid for, with the exception of one amount of £4 18s., which the petitioner prevented him from paying, because petitioner took a shop next door and undersold his goods. He had never made arrangements to leave the Colony.

The Chief Justice: When the order was made I certainly assumed that the applicant would be able to prove the allegations in his petition. The insolvent swears that he has no intention of leaving the Colony, and there is no rebutting evidence. The order must be discharged, and if any costs had been incurred by the insolvent, applicant would have been ordered to pay them. The writ of arrest is discharged.

[Applicant's Attorney, D. Tennant, jun.]

40. T. C. 986

MACINTOSH v. BOTHA. { 1896. Feb. 13th.

Attachment—Previous execution—Funds in Sheriff's hands—Practice.

Where a balance from the proceeds of a previous execution remained in the hands of the Sheriff the latter refused to satisfy a subsequent judgment debt therewith except under an express order of Court.

Mr. Buchanan applied for an order for the attachment of certain funds in the hands of the Sheriff to satisfy a judgment of £150 obtained by the applicant against the respondent on the 6th inst.

The Chief Justice: I understand the Sheriff followed the ordinary practice of his office, and required that before any money could be attached an application must be made to the Court. I am not prepared now, without further consideration, to decide that the practice is wrong. The fact that it has existed for some time is certainly a circumstance in his favour. The money so held is trust money and has not been considered as falling under the description of goods and chattels. The Court is of opinion, however, that the present application should be granted.

ADMISSION.

Ex parte CHRISTIAN.

On the application of Mr. Benjamin, Owen Vyvyan Christian was admitted as an attorney and notary, the oaths to be taken before the Resident Magistrate at Port Elizabeth.

REHABILITATION *Ex parte* LAMBERT.

Mr. Jones applied for the rehabilitation of Arthur Oliver Lambert.

Granted.

ATTORNEY-GENERAL v. KIRSTEIN.

Mr. Jones applied for an order making absolute the rule *nisi* calling upon the alleged lunatic, Maria Johanna Kirstein, to show cause why she should not be declared of unsound mind and incapable of managing her own affairs.

Evidence on affidavit having been read,

Mr. Joubert, for the Attorney-General, said there was no objection to the order.

The Chief Justice: The Court will grant the order and appoint as the curators of the lunatic Maria Johanna Kirstein's property, J. C. van Graan and Kirstein, and J. C. van Graan as curator of her person; costs to come out of the lunatic's estate.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

SOUTH AFRICAN ASSOCIATION v. DE JONGH. { 1896. Feb. 14th.

Mr. Maskew appeared for the plaintiff. Mr. Sheil, for the defendant, confessed judgment.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

GENERAL MOTIONS.

In re BEEDLE AND CO., IN LIQUIDATION. { 1896. Feb. 17th.

Mr. Searle, Q.C., presented the first report of the official liquidators.

The report stated that the assets were estimated at £800, liabilities £650. The company was formed in October, 1893, for the purpose of making pianos and organs. The nominal capital was £10,000, whereof £4,100 was issued (£2,000 was subscribed, and £2,100 went to the vendors and promoters). Of the subscribed capital only £1,566 has been paid.

The Court made the usual order as to publication and inspection.

In re ANTE-NUPTIAL CONTRACT OF MATHYS J. MARAIS AND ELIZABETH PARROTT.

Mr. Graham applied for authority to the Registrar of Deeds to register the said contract, which, owing to erroneous instructions, was not lodged within the period prescribed by law.

Granted.

IN THE MATTER OF THE CAPE TRANSVAAL GOLD-MINING ASSOCIATION, IN LIQUIDATION.

Mr. Graham presented the third and final report of the official liquidator.

The report stated that the call recommended in the second report realised £575 15s. 7d. The debts of the company have all been paid in full, amounting to £466 17s. 11d., against the previous estimate of £464 4s. 6d.; cost of liquidation,

£133 1s. 6d. It was recommended that the balance now in hand be applied as follows: Refund to contributories who have overpaid on calls made, £6 5s.; refund, 1s. 3d. per share to all contributors who paid in full, £274 3s. 9d.; liquidation expenses, £43 17s. 4d.

The Court made the usual order.

IN THE ESTATE OF THE LATE SOPHIA M. FISCHER.

Mr. Molteno applied for authority to the Registrar of Deeds to register the cession executed by the executor dative of the said estate of certain mortgage bond due and payable to the children of the late Pieter U. Fischer by arrangement made with their mother, who has a life interest in the amount of the said bond.

Granted.

THE PETITION OF JACOBUS J. VILJOEN.

This was an application for authority to the Registrar of Deeds to amend certain two deeds of transfer, dated 23rd July, 1894, relating to the farm Elands Kloof, in the division of Caledon, by describing the land conveyed as the remaining extent, measuring 439 morgen and 380 square roods, of the said farm, instead of an undefined portion thereof, the land having been partitioned in 1848, but subsequently dealt with as though no partition had been made.

Mr. Benjamin moved and stated that no one else was interested.

Granted.

THE PETITION OF JOHN P. WILDREDGE. { 1896. Feb. 17th.

Mr. Watermeyer applied for authority to the Registrar of Deeds to register as the property of petitioner the remaining extent of certain farm known as Nooitgedacht, situate in East Griqualand, he having purchased an undefined half-share of the said farm at a sale in execution, and having since then come to an arrangement to take over a defined portion agreed upon.

The Court granted a rule *nisi* calling on all concerned to show why transfer should not be made to the plaintiff of the remaining extent of the farm Nooitgedacht by the Deputy-Sheriff of Kokstad, the rule to be served upon William Kook and his wife, returnable on the last day of term.

THE PETITION OF ARTHUR S. LAKE.

Mr. Joubert applied for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion; also for the custody of the children of the marriage.

The application was adjourned so that the petition may be amended by addition of information as to the question of domicile.

REGINA V. BENDUKKER. { 1896. Feb. 17th.

This was the matter of a conviction of one Sophia Bendukker by the Resident Magistrate, Namaqualand, on a charge of concealment of birth. The records had been referred to the Attorney-General by the Chief Justice, before whom as judge of the week they had come.

Mr. Joubert for the Crown was heard in support of the conviction. The real questions were: Had the Magistrate proof of any birth at all, also were the dates sufficiently definite and consistent? The chief evidence against her on both these points was that of a coloured woman. The dates given by witnesses of that class are always vague, but she is positive as to prisoner being *enceinte* in April and looking different in May. The doctor testified that in November the woman was six months pregnant; the child in question is alleged to have been born in April.

The Chief Justice: If the doctor is correct the birth is about due now. Inquiries must be made from the Magistrate as to whether it has taken place or not.

Postea (February 20th).

The Chief Justice said: The Magistrate has sent a telegram stating that the child of Sarah Bendukker was born about the middle of February. Under these circumstances the conception would have taken place in May. That would be quite consistent, therefore, with the previous child being born in April. The time is short, but still it is quite possible. That being so it is impossible to discredit the evidence of all the witnesses that when the prisoner came back from Cape Town she was in the family way. There is also the evidence of the woman who says she was actually present at the delivery of the child about April. Under these circumstances the decision of the Magistrate will be confirmed.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

GENERAL MOTIONS.

CORNEL v. FACTOR AND ANOTHER. { 1896. Feb. 18th.

Mr. Graham applied for an order requiring the respondents to restore to applicant certain wagon and four donkeys, his property illegally seized and taken out of his possession by them as security for a debt alleged to be due to them by him.

The Chief Justice: Take your rule, calling on the defendant, to show cause on the last day of term why the property mentioned in the affidavit of 9th January, 1896, shall not be restored to him by the respondents as prayed.

SCOTT v. CLARKE AND CO. { 1896. Feb. 18th.

Jurisdiction—Resident Magistrate's Court—Residence of defendant—Place of business, Act 20 of 1856, section 8.

The defendant resided at Wynberg and carried on business in Cape Town under the style of F. C. & Co.

In an action before the Resident Magistrate, Cape Town, the case was dismissed on the exception being taken that as defendant resided at Rondebosch, in the district of Wynberg, the case should have been brought before the Resident Magistrate of Wynberg.

Held, on appeal, *that the exception was good, and that the fact of the defendant carrying on business in Cape Town under the style of a company was immaterial in this connection.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the present appellant, plaintiff in the court below, sued the respondent firm for the recovery of certain printing plates, or their value, £5.

The summons alleged that in October, 1895, the defendant wrongfully and unlawfully appropriated and possessed himself of certain one business card copper-plate, and one bill-head plate, the property of the plaintiff, of the value of £5 or thereabouts, and refused to restore the same, though requested to do so.

The defendant excepted to the jurisdiction on the grounds that he resided at Rondebosch, in the district of Wynberg.

Evidence was then taken on the exception. The defendant deposed as follows: I am the defendant in this case. I reside at Rondebosch, in the Magisterial district of Wynberg.

Cross-examined: I carry on business as F. H. Clarke & Co., printers and publishers. My business premises are in Cape Town. I have no partners in my business. The business premises of F. H. Clarke & Co. are in Cape Town. I pay rates in Cape Town.

Re-examined: I own landed property in Cape Town.

The exception was sustained and the summons dismissed with costs.

The following were the Magistrate's reasons: I found that although defendant carried on business in Cape Town as F. H. Clarke & Co., he resided in the district of Wynberg, and I held that inasmuch as he had no partners in the business carried on in Cape Town, defendant could not be regarded as a company or corporation trading in Cape Town, and that this Court had no jurisdiction as he does not reside in this district.

From this judgment the plaintiff now appealed.

Mr. Graham for the appellant contended that the proper place for the summons to be taken out is where the defendant carries on business. As to the meaning of "reside" see *Beedle & Co. v. Bowley* (5 Sheil, 412). Besides, respondent holds himself out as a company; it doesn't lie in his mouth to deny he is a company, and the proper place to sue is where the company carries on business.

Mr. Molteno for respondent.

The Court dismissed the appeal.

The Chief Justice: The fact that the defendant calls himself Clarke & Co. does not alter the matter at all, because it is as an individual he is sued, and his residence is not within the Cape Town district. He must therefore be sued in the district wherein he resides. I think the Act ought to be amended, and placed on the same footing as the English Act, which refers to persons having their place of business as well as residence in a certain district. The appeal must be dismissed with costs.

[Appellant's Attorney, David Tennant, jun. Respondent's Attorney, J. Ayliff.]

SCHRODER V. HAYNS. { 1896. Feb. 18th.

Purchase and Sale—Conditions—Price—Instalments.

Certain goods were sold for £22 on two conditions, viz., that the goods should remain the seller's property until paid for in full, and that at least £1 should be paid in every month. After £17 had been duly paid in monthly instalments but before the expiration of twenty-two months the seller sued the purchaser for the full price.

Held, on appeal, *that the purchaser was entitled to the benefit of the second condition and that, having paid the monthly instalments as they fell due, he could not before the expiration of the full period be sued for the price in full.*

This was an appeal from a decision of the Acting Resident Magistrate of Wynberg in an action in which the present respondent, plaintiff in the Court below, sued the appellant, defendant, for the sum of £6, being, as the summons alleged, the balance due on an account for goods sold and delivered in May, 1895.

The defendant pleaded that there was no cause of action, plaintiff and defendant having entered into a written agreement whereby the debt was liquidated.

The defendant gave the following evidence: I am the defendant. After the debt (£22) now sued on was contracted by me, an agreement was entered into by plaintiff and myself that the debt should be liquidated by instalments of £1 a month. I have paid £17 on account and still owe £5. I paid £1 at the beginning of the current month. (Plaintiff gives credit for the £1.)

Cross-examined: I paid the amounts by post-office order and cheque. On 31st May and 30th June I paid £1. On 23rd July, £8. In August, September, and November I paid £1. In December I paid £2, and in January £1.

By the Court: I received a demand for the amount. The agreement provided that the articles sold should remain the property of Heyns until paid for in full, and that at least £1 should be paid off every month.

The Acting Resident Magistrate gave judgment for the plaintiff for £5 and costs, the following being his reasons: In this matter defendant admits owing £5, balance of account for goods sold and delivered, but contends that the debt was liquidated by an agreement entered into between plaintiff and himself. This agreement, or condition of sale, in my opinion, was drawn up simply to protect the plaintiff, and cannot be accepted as a liquid document. There is nothing on the face of the document to debar plaintiff at any time from recovering the full amount of his debt, should he feel so inclined. The defendant having had a proper demand the plaintiff, I consider, is entitled to judgment.

The defendant now appealed.

The respondent was not represented.

Mr. Graham for the appellant contended that the agreement between the parties must mean that so long as the buyer pays the £1 per month the seller cannot sue. The plea was badly drawn though no prejudice was caused: it should have been that there was a debt but that the amount was not due, the condition not being fulfilled.

The Court allowed the appeal.

The Chief Justice said: The goods were sold for £22 upon two conditions, that the goods should remain the seller's property till paid for in full, and that at least £1 should be paid off every month. The first was a condition in favour of the seller and the second was a condition in the purchaser's favour. But for this second condition the price would have been payable forthwith. The Magistrate held that the conditions of sale were drawn up simply to protect the seller and, in an action brought by the seller for £5 still owing, judgment was given in his favour. "There is nothing," said the Magistrate, "to debar plaintiff at any time from recovering the full amount of his debt should he feel so inclined." In this view I am unable to concur. The plaintiff had secured himself by a suspensive condition, the effect of which really was, as pointed out in *Quirk's Trustees* v. *Liddle's Assignees* (3 J., 322), that there was to be no sale pending the payment of the price in full. But before the time allowed by the second condition he claimed payment of the price in full. The defendant entered into the contract in the belief that he would be allowed twenty-two months, if he required the time, to pay the price. He paid the instalments as they fell due every month and he could not therefore, before the expiration of the full period, be sued for the price in full. The appeal must be allowed with costs.

[Appellant's Attorney, J. Ayliff.]

BREST AND LADON V. HEYDENRYCH. { 1896. Feb. 18th.

Purchase and sale—Arrha—Earnest—Damages—Resale—Refund.

An agreement for the sale of furniture contained the stipulations that the furniture

should be delivered to the purchasers but remain the property of the seller and that moneys paid on account should count as hire of the furniture. At the time of the agreement the purchasers paid £10 *on account but they did not obtain possession of the furniture. The plaintiffs refused to pay the price, whereupon the defendant resold the furniture for a sum less by* £4 *than the price agreed upon.*

Held, *that the measure of damages to which the seller was entitled was the difference between the price agreed upon and the amount realised on the re-sale.*

Held further, *that if the* £10 *had been paid by way of* arrha *or earnest money without any further stipulation the purchasers would not have been entitled to a refund of the money, but that, as it was expressly stipulated that moneys paid on account should count as rent and as the purchasers never had possession of the furniture, they were entitled to a refund.*

Judgment was accordingly entered for the purchasers for the £10, *less the amount of the damages sustained by the seller.*

This was an appeal from a decision of the Resident Magistrate of Cape Town, in an action in which the present appellants, plaintiffs in the Court below, sued defendant for £20.

The summons alleged that the plaintiffs on or about the 11th September, 1895, purchased certain furniture from the defendant and paid him the sum of £10.

That the defendant wrongfully and unlawfully detained from them and refused to deliver the said furniture, although they were willing to pay him the balance of the fair and just value of the furniture, yet the defendant wrongfully refused to deliver the furniture, and did by such wrongful act cause the plaintiffs damage in the sum of £10.

The plaintiffs claimed a refund of the £10 paid on account of the furniture, and £10 as damages.

The defendant in his plea denied the allegations in the summons, and specially pleaded that the transaction was governed by a written contract entered into by the parties on 11th September, 1895.

The main facts are briefly these: Under the written agreement the plaintiffs undertook to buy the furniture from the defendant, the same to be valued by a Mr. Cressey. They further undertook to pay the defendant on the 12th September, 1895, two-thirds of the value of the furniture, the balance to be paid two months afterwards, the furniture to remain the property of the defendant, and not to be disposed of until the balance had been paid. In the event of the balance not being paid when due, the defendant was to have the right to take possession of the furniture for such balance. And all moneys paid on account were to count as hire of the furniture.

The cost of valuation (5 per cent.) to be paid to Cressey to be divided into three equal shares.

The plaintiffs' evidence went to show that on the 10th September they paid the defendant £10 on account, that before the contract was signed the defendant represented that Cressey was a sworn appraiser, and that it was agreed that if Cressey's valuation was too high, the plaintiffs could have the right of calling in any Cape Town auctioneer to revalue the furniture.

That they subsequently discovered that Cressey was a friend of the defendant, and not a sworn appraiser.

Cressey valued the furniture at £34, and the plaintiffs being dissatisfied with this valuation as being excessive, called in Mr. Jones to revalue the furniture, one of whose assistants valued it at £19 2s. 6d. The plaintiffs then tendered to pay the defendant in accordance with the lower valuation, but the tender was refused, and the defendant subsequently sold the furniture for £30.

The furniture was on premises which the plaintiffs had agreed to lease, but they stated in evidence that in consequence of not being able to get possession of the furniture, the lessor refused to give them occupation, and subsequently let the premises to other persons.

Defendant in his evidence denied that he had stated that Cressey was a sworn appraiser. He admitted that he had told the plaintiffs that Cressey was a good valuator, and had done work for him before.

The defendant also denied that any agreement was come to, before the signing of the contract, that if Cressey's valuation was too high an auctioneer should be called in.

The plaintiffs' tender under the second valuation was admitted. The Magistrate granted absolution from the instance with costs, holding in effect that the parties were aware of the contract into which they were entering, that there was no allegation of fraud or false representation in the summons, and that the difference in the two valuations might be accounted for by the fact that certain articles which appeared on Cressey's valuation did not figure in the second valuation.

From this judgment the plaintiffs now appealed.

Mr. Molteno was heard in support of the appeal. The Resident Magistrate's reasons clearly show that he overlooked the main question—the refund of the £10—and the legal points therein involved. He was right in taking appellants as bound by the appointment of Cressey as valuator as they signed the agreement. But they paid £10 before the contract was signed and Heydenrych then would not give possession: and as they were entitled at once to this, he thus caused a total failure of consideration. Heydenrych simply claimed the £10 as *forfeit* for breach of contract: his proper remedy being really damages for the breach—the measure thereof being only £4 considering what he obtained later on a resale of the furniture. The amount of the £10 claimed as a forfeiture should if anything be treated as hire: yet the essence of hire should be that possession was given.

Mr. Benjamin for the respondent urged that part of the agreement was that two-thirds of the purchase price should be paid by the 12th September. This condition precedent was not fulfilled; on the 16th September respondent offered possession if they would pay this two-thirds: but appellants refused to give anything more than a further £2 15s. The deposit made must be taken as earnest-money and to claim it back appellants must come with clean hands. As earnest, it was forfeited on failure of purchaser to fulfil the contract (*Grotius*, 3, 14; *Justinian's Institutes*, 3, 23, 1). As an alternative indeed the £10 deposit might be taken as liquid damages (*Anson on Contracts*, Part IV., Chap. II.).

The Court allowed the appeal.

The Chief Justice said: The view taken by the defendant of the contract clearly appears from his letter of 16th September, 1895, in which he writes: "Unless you carry out the terms of your agreement as to the purchase of the furniture by the 17th. I shall consider your deposit of £10 forfeited." The agreement, however, does not provide for a forfeiture. The plaintiffs bought certain furniture from the defendant at a price to be fixed by a Mr. Cressey, and they undertook to pay two-thirds of the price on a given day and the balance two months afterwards. The furniture was to be delivered to the plaintiffs but was to remain the property of the defendant and was not to be disposed of until payment of the balance of the price. In the event of the balance not being paid when due the defendant was to have the right to take possession of the furniture for such balance, and all moneys paid on account were to count as hire of the furniture. At the time of the agreement the plaintiffs paid £10 on account but they did not obtain possession of the furniture. They failed to pay the price fixed by Cressey, and thereupon the defendant treated the contract as cancelled and sold the furniture. The plaintiffs in their action claimed £10, being a refund of the sum paid on account, and £10 as damages, but it is obvious that, as they broke the contract by refusing to pay the price, the defendant is entitled to claim damages and not the plaintiffs. Now what is the measure of the defendant's damages? He sold the furniture to the plaintiffs for £34 and he obtained on a re-sale the sum of £30, and he can only claim the difference of £4 as his damages. But he also claims the right to retain the sum paid to him on account as being in the nature of *arrha* or earnest money, If the £10 had been paid to him as such earnest without any further stipulation his claim to retain it would have been valid. (*Cf. Voet*, 18, 1, 25.) But it was expressly stipulated that money paid on account should count as rent of the furniture. The furniture was never delivered to the plaintiffs and there was no rent whatever payable by them. They are, in my opinion, therefore entitled to a refund of the sum paid by them, and, deducting from the sum the damages sustained by the defendant, there remains a sum of £6 due to the plaintiffs. For this amount judgment ought to have been given by the Magistrate. The Court will therefore alter the judgment by awarding to the plaintiffs the sum of £6 with costs in this Court and in the Court below, but in these costs will not be included the expenses of the witnesses, for they were called to prove damages to which the plaintiffs are not entitled.

[Appellants' Attorney, J. Ayliff; Respondent's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

WOOD V. BOTES. { 1896. Feb. 20th.

Mr. Tredgold moved for provisional sentence on a notarial bond for £45, together with interest at the rate of 10 per cent. from June 1, 1893.

Granted.

LIQUIDATORS OF HAND AND CO. V. VAN ZYL.

Mr. Molteno moved for provisional sentence for £80 6s. 3d., together with interest on a promissory note, due date December 15.

Granted.

DUTCH REFORMED CHURCH V. SNYMAN.

Mr. Molteno moved to have the provisional order of sequestration made by the Chief Justice on January 17 last discharged, the matter having been arranged between the parties.

The Court discharged the order of January 17.

ILLIQUID ROLL.

KRUGER, PELSER AND CO. V. VAN DER WALT.

Mr. Innes, Q.C., moved to enter judgment in default of plea. The action was brought to recover £387 8s. 4d., goods sold and delivered, and £100, balance of capital due.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF WILLIAM G. McDONALD. } 1896. Feb. 20th.

Mr. Graham applied for the appointment of a curator of the property of the said McDonald, who is detained as a lunatic at Valkenberg Asylum, under the provisions of the Lunacy Act, in order that certain land situated at Woodstock, and registered in his name, may be sold and the proceeds devoted towards his maintenance in the asylum after defraying the costs of these proceedings.

The Chief Justice said: The fact should be stated publicly that where a lunatic has property, or where his relatives have property, the lunatic ought to be maintained at the expense of the estate. If the friends are able to pay they should do so.

The Court granted the order, the secretary for the time being of the Colonial Estate and Orphan Chamber to be the curator. The costs of the application to be defrayed out of the lunatic's estate.

CILLIERS' TRUSTEES V. CILLIERS.

Mr. Searle, Q.C., applied on behalf of the defendant for an order deferring the trial of the suit between the parties, set down for hearing in the Supreme Court on the 25th inst. till May term, on the ground that several of her witnesses reside in the districts of Beaufort West and Victoria West, and other evidence will be required which cannot be obtained in the time at her disposal.

Mr. Graham appeared for the respondent.

The Court ordered the case to be set down for March 4, the costs to abide the result.

IN THE MATTER OF EDWARD B. THOMAS, AN ALLEGED LUNATIC.

Mr. Graham applied for the appointment of a provisional curator to take charge of the property and securities of the alleged lunatic, and also for the appointment of a *curator ad litem* to represent him in proceedings about to be instituted to have him declared of unsound mind and incapable of managing his affairs.

Mr. Graham said that if the summons were made returnable next week, there would be no necessity for the appointment of a curator.

The Court made the summons returnable on Tuesday next, and appointed Mr. Buchanan *curator ad litem*.

IN THE MATTER OF THE MINORS BERG.

Mr. Tredgold applied for authority to the father of the said minors to raise a sum of money on mortgage of a half-share of the farm Samson's Kloof, in the district of Somerset East, bequeathed to them by the joint will of their parents, for the purpose of paying the debts of the estate, it being to the interest of the minors that the landed property should be retained.

The Court granted the application in terms of the Master's report.

MADDISON V. BOSMAN.

Mr. Innes, Q.C., applied on behalf of the plaintiff for an order for the removal of the trial of the suit between the parties to the Circuit Court about to be held at Beaufort West, on the grounds that all witnesses reside there, or otherwise for an order setting down the case for hearing in the Supreme Court on Friday the 28th instant.

Mr. Graham appeared for the respondent.

The Chief Justice: On the whole we are of opinion that the balance of convenience is in favour of trial at the next Circuit Court. The Court therefore orders the case to be tried at the next Circuit Court at Beaufort West, the costs of the application to abide the result.

IN THE MATTER OF THE MINORS NORTJE.

Mr. Jones applied for authority to the father of the said minors to sell certain portion of the farm known as Welbedacht, in the district of Oudtshoorn, bequeathed to them by the joint will of their parents, and to apply the proceeds

in part payment of the purchase price of a larger and more valuable farm provisionally bought by them.

Granted.

HADJE SALIE AND OTHERS v. SAHIBO. } 1896. Feb. 20th.

Malay mosque—Imaum—Rights of congregation—Meetings.

Where the members and office-bearers of a Malay mosque applied for an order compelling the Imaum to call a meeting of the congregation for the purpose of electing his successor and of settling disputes in connection with the finances of the mosque, the Court refused to grant the order in the absence of proof of any legal obligation on the part of the Imaum to call such meetings.

This was an application by the applicants as members and office-bearers of the congregation worshipping in the mosque in Chiappini-street, of which the respondent is Imaum, calling upon him to show cause why he should not be directed to convene a meeting of the congregation of the mosque on such day as the Court should direct, for the purpose of discussing and settling such matters as might be submitted to the meeting, to wit, the election of a member of the congregation to assist the respondent in the execution of his duties as Imaum, which it was alleged he was now unable to carry out, to decide upon the election of a successor to take office at his death, to consider the finances of the congregation and the steps to be taken to effect the necessary repairs to the building annexed to the mosque, and for such other relief as the Court might be pleased to grant, with the costs of the application.

The applicants alleged that they and the greater portion of the congregation were dissatisfied with the manner in which the services in the mosque during the hours of worship were conducted by one Hasseim, the respondent's son, who had been appointed to assist his father as Imaum.

That Hassiem's language and conduct during the hours of worship were such that it was necessary that steps should be taken to prevent such unseemly conduct being continued and thereby avoid a breach of the peace.

(One of the applicants stated that since notice of the application had been given he had heard Hassiem during service call out that the "pigs and dogs"—referring to the applicants—should be turned outside.)

That adjoining the mosque a building was erected by the founders, to be used solely during feast days, having annexed to it a small room for the use of the caretaker of the mosque.

That the respondent had used part of the building as a cow-stable but had been compelled to discontinue using it as such, and that since that time the respondent with various members of his family have occupied and still occupy the building as a dwelling-house, which is not in accordance with the Mohammedan faith nor with the object for which the building was erected.

That the building is becoming very dilapidated and requires repairs to prevent further deterioration, and that the finances of the congregation require to be investigated. That with a view to a proper discussion of all these matters with the respondent, and to avoid scandal to the congregation, the applicants applied to the respondent, who has the custody of the key of the mosque, to convene a meeting of the congregation but he declined to do so.

The applicants finally alleged that in order to prevent serious disputes and to arrive at a proper settlement of the several matters referred to, it was necessary that a meeting of the congregation should be held in the mosque, and that the respondent should be directed to convene such a meeting in regular order.

The respondent and his witnesses in their affidavits denied that the applicants were office-bearers or members of the congregation, some of them having ceased to be members eight years ago and others having been expelled.

They alleged that Hassiem had always given satisfaction as gatiep of the mosque, that he was a model preacher, and that his conduct could not be assailed.

The respondent denied that the building adjoining the mosque was erected for the sole use of feast days. He said that the building was still used for feast days, and the fact that he and his son and their families occupied the building in no way interfered with the feast days, and he denied the allegation that it was contrary to the Mohammedan faith to live in such a building and he stated that previous Imaums and their families lived in the building.

He asserted that it was not the custom for Malay priests, in general, ever to lay financial statements of their mosques before their congregations, but to satisfy the applicants, although they no longer belong to the mosque, he had instructed his attorney for peace sake to inform the applicants that the mosque had no liabilities, and moreover that there were no funds in hand belonging to the mosque.

He further stated that it was a custom with Mahommedans that the Imaum need not account for moneys given to him and that he could do with the money as he thought best.

He alleged that at a large meeting held in the mosque on the 7th October, 1887, Hasseim was elected as assistant to his father and as his successor after his death, in terms of a document drawn up by the respondent and thoroughly explained to the congregation by the respondent's attorney.

This document was attached to the attorney's affidavit and bore the signatures of three of the present applicants.

The respondent further alleged that the applicants were actuated by spite and that they were trying to stir up his congregation against him and Hasseim.

Hassiem in his affidavit denied that he had ever made use of the language in the mosque as complained of by the applicants.

The applicants in their replying affidavit denied that the meeting of the 7th October, 1887, had been duly convened and they further denied that they were actuated by malice in the present proceedings.

Mr. Sheil was heard in support of the application.

Mr. Schreiner, Q.C., for the respondent.

The Court made no order.

The Chief Justice: It is unnecessary to hear Mr. Schreiner for the respondent. The application is twofold. First of all, to compel a meeting to be held for the purpose of deciding who is to be Imaum after the respondent's death; and secondly, for the purpose of laying before such meeting the financial affairs relating to the mosque. As for the first part of the application, the proper time to elect an Imaum will be upon the death of the present Imaum. A meeting will then no doubt be duly convened, and if the congregation are satisfied with Hasseim, who is the respondent's nominee, I have no doubt they will then elect him, but we cannot now compel the Imaum to call a meeting for the purpose of nominating a successor. Such a meeting has been held, and a proper nomination made. Whether this will be confirmed or not is a question for the congregation hereafter to decide. As to the second part of the application, it is such a purely internal affair of the congregation that the Court ought not to interfere. The question of meetings should be decided by the Imaum. If legal steps are taken to compel the Imaum to render an account, then the proper course is to bring an action against the Imaum for an account, and a *prima-facie* case must be made out that the partially rendered account is not complete. In my opinion the most improper thing would be to call a meeting. There would be no proper chairman and no proper order. If we call a meeting on financial matters the confusion would be worse confounded after the meeting. It lies upon the applicants to show that there is a legal obligation upon the respondent to call such a meeting, and in the absence of such proof there is no ground whatever for this application. There will be no order, but the respondent must have his costs.

[Applicants' Attorney, W. E. Moore; Respondent's Attorneys, J. C. Berrangé & Son.

IN THE MATTER OF THE MINORS JACKSON. 1896. Feb. 20th.

Mr. Molteno applied for authority to the mother of the said minors to purchase on their behalf certain portions of the farms Brakkefontein and Mistgunst, situate in the district of Mossel Bay, over which they have an option, at a fixed sum far below the real value, and for leave to mortgage the same for portion of the purchase price and expenses which she is unable to provide.

The Court granted the order in terms of the prayer of the petition.

IN THE MATTER OF THE MINORS MEYER.

Mr. Searle, Q.C., applied for authority to the executrix testamentary of the estate of the late Ockert S. Meyer to pass a mortgage bond for the purpose of providing funds for the purchase of certain farm known as Riet Valley, in the district of Mossel Bay, now registered in the name of the legal representative of the said Meyer, the said property having been acquired in terms of the will of the late Helgard P. Meyer and deceased wife.

Granted.

REGINA V. ADAMS. 1896. Feb. 20th.

Theft of Stock—Act 35 of 1893—Evidence sufficient to justify conviction.

Where the Magistrate convicted B., *who was charged with a contravention of Act* 35 *of* 1893 *by the theft of a goat, the chief evidence being that the goat's head and skin had been found about* 200 *yards from prisoner's hut, and that on persons coming to the hut to search it the prisoner's daughter was observed to throw some cooked goat's flesh out of the window,*

Held on appeal *that the evidence was sufficient to justify the conviction.*

This was an appeal from a sentence of twelve months' imprisonment with hard labour passed upon the appellant, one Bill Adams, a servant in the employment of a farmer named Bosman, by the Assistant Resident Magistrate of Willowmore at Steytlerville on the 20th January last.

The accused was charged with the theft of a goat under Act 35 of 1893 and pleaded not guilty.

The evidence for the prosecution went to show that the head and skin of a goat belonging to Bosman were found about 200 yards from the prisoner's hut, the goat's throat having been cut and the greater part of the flesh removed.

On the discovery being reported to Bosman he and two other men went to the prisoner's hut. The prisoner's daughter was found in the hut in bed. Bosman asked her to get up and dress and then left the hut. After he left the hut the two men, who had accompanied Bosman, saw the prisoner's daughter throw some cooked goat's flesh out of the window.

Bosman subsequently searched the inside of the hut but could find nothing of an incriminating character. The prisoner's case was that he had found a dead goat at the spot where the head and skin were discovered, that he skinned it and removed part of the flesh to his hut. and that he put the skin into a bush with stones over it to prevent wild animals from taking it away.

After the prisoner had been arrested he offered Bosman another goat for the meat which he had taken.

The prisoner was found guilty and now appealed from the sentence passed upon him.

Mr. Graham was heard in support of the appeal.

Mr. Joubert for the Crown was not called on.

The Court sustained the conviction, and the appeal was dismissed.

The Chief Justice: This appeal ought to be dismissed. The case seems to be reasonably clear against the prisoner. If he were innocent, and had picked up the dead carcase of a goat, his conduct when Bosman came to search would have been more in accordance with innocence if he had made a clean breast of it. Instead of that he conceals everything, and allows his daughter to throw the meat out of the window. All the circumstances go to show the prisoner guilty. The evidence shows that the goat was not dead when its throat was cut, and therefore we think the conviction quite right. It has been said the prisoner was a white man. I do not see that this affects the case at all. Evidence has been given in many cases against black men not one whit stronger, and convictions have followed.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

KINDI V. MURRAY.

Mr. Searle, Q.C., on behalf of defendant, applied that this case, which was set down to be heard on Tuesday next, be allowed to stand over until the August term on account of the absence in England of the defendant; or that a commission be appointed to take defendant's evidence in London.

Mr. Sheil appeared for the plaintiff.

The Court granted the postponement until the first day of the May term. In the meanwhile the Court appointed a commission to take the evidence *de bene esse* of Mr. Murray. The defendant to pay the costs of the present application and all costs that have been rendered futile in consequence of the postponement.

IN THE INSOLVENT ESTATE OF LE ROUX. } 1896. Feb. 20th.

Insolvency—Proof of debt—Subsequent sequestration—Act No. 38 of 1884, section 17.

The right of creditors under the 130*th section of the Insolvent Ordinance, to prove upon an insolvent estate for the balance of debts owing to them under a previous insolvency, is not taken away or affected by the* 17*th section of Act* 38 *of* 1884.

This was an application on notice to the respondent calling upon him to show cause why his election as one of the trustees of the insolvent Estate of Frederick Daniel le Roux should not be set aside and declared invalid, and why the applicant should not be appointed sole trustee in the said estate and why the costs of the application should not come out of the insolvent estate.

The applicant annexed to his affidavit a copy of the minutes of the second meeting held in the insolvent estate of F. D. le Roux on the 23rd January, 1896, before the Resident Magistrate of Tulbagh.

At this meeting the applicant had the votes of the following creditors:

My own vote (applicant's)... ...	£63	8	0
P. J. P. Marais	53	14	4
J. P. le Grangé	31	0	0
A. P. Zeeman	154	0	0
J. C. Winterbach	374	7	6
J. C. Winterbach	78	15	6
	£755	5	4

The respondent had the votes of:

P. A. de Klerk	...	...	...	£174	19 10
G. Barker ...	...	.	...	250	0 0
C. Adams ...	...	...	...	69	10 0
H. J. Botha	...	...	...	125	8 11
				£619	18 9

It was proposed that the applicant should be elected sole trustee and also that the respondent should be elected sole trustee.

The applicant alleged that although he had a majority of votes both in number and value, and although no proposal was made as to a joint trusteeship the Magistrate declared the respondent and the applicant elected joint trustees.

The applicant's agent objected at the meeting to the Magistrate's ruling which objection was noted, and the applicant himself objected to the ruling at a hearing of it on the 24th January, 1896.

A document (Master's Office, Insolvency Law Branch, No. 4, G. 254) was signed by the creditors agreeing to the appointment of the applicant and respondent as joint trustees, and this document was signed by J. C. Winterbach, *q q.*, the applicant, and by Charles Adams, the respondent's agent, accepting the trust.

On the same day that the document was signed Winterbach wrote withdrawing his consent to the respondent being appointed joint trustee.

The respondent in his affidavit alleged, with regard to votes in number and value in favour of the applicant, that the first amount, £63 8s., was made up as follows, viz., a deficiency in the final liquidation account filed by the trustees in the insolvent estate of Le Roux surrendered in 1886 amounting to £42 being for an open account to which amount interest from 1st July, 1887, £21 8s. was added making the sum of £63 8s. proved at the second meeting of creditors on the 23rd January, 1896, in the second insolvency of the said Le Roux.

That as to Winterbach's claim of £374 7s. 6d., the same was made up as follows, viz., a deficiency on mortgage bond amounting to £247 2s. 6d., to which interest amounting to £127 5s. was added, making the sum of £374 7s. 6d. proved at the second meeting of creditors in the second insolvency of Le Roux.

That this mortgage bond was proved in Le Roux's first insolvency and was in part satisfied, leaving a balance.

The respondent said that he had been advised and believed that the above-mentioned claims should not have been allowed by the Magistrate, in which case he would have had the majority in number and value of claims proved against the said estate at the second meeting of creditors.

Mr. Searle, Q.C., was heard in support of the application, and after referring to section 40 of Ordinance 6 of 1843, contended that the Magistrate was bound by the proofs if accepted, and that as it was clear on the face of the record that the applicant had a majority in number and value the Magistrate erred in not declaring him elected sole trustee.

Mr. Innes, Q.C., for the respondent: Taking the list of claims proved it cannot be denied that the applicant had five votes for £755 and the respondent four votes for £619. But upon the face of the proceedings it appears that three of the creditors who voted for the applicant, were creditors in respect of debts due by the insolvent on the first sequestration of his estate in 1886, viz., Lindenberg for £63 8s., Zeeman for £154 and Winterbach for £374; that is, three votes representing £591 8s. If these were deducted the applicant would only have had two votes representing £164, and the respondent would have had four votes representing £619, a clear majority in number and value.

The question then arises, could these three votes count?

By Act 38 of 1884, section 17, after the lapse of four years a creditor cannot apply under section 124 or section 127 of Ordinance 6 of 1843, or proceed in any manner against the insolvent.

It is submitted that these words preclude his proving under a second sequestration.

After confirmation of his account an insolvent may acquire property and his old creditors may apply for his civil imprisonment (section 124), or they may apply for summary execution against his property (section 127), and under section 180 they might prove under a second sequestration, but the policy of the Act of 1884 was to take away all these remedies after the lapse of four years, hence the wide wording of the 17th section.

It may be contended that all creditors whose claims stand proved can vote (section 40) and that the respondent should move to have the three proofs of debt expunged under section 27. But there appears to have been some arrangement by which all the creditors agreed to the two trustees being appointed and that may account for the Magistrate's action in appointing joint trustees which would otherwise have been illegal: *Graham* v. *Caldecott* (Buch., 1876, p. 4).

The Court has wide powers under the 40th section and may postpone the matter to enable the respondent to make a cross application. The justice of the case requires that this should be done.

Mr. Searle, Q.C., in reply: The 17th section of Act 38 of 1884 merely confers some personal privileges on the insolvent, but it was not intended by that section to deprive creditors of their rights under section 130 of the Ordinance.

If it were otherwise there would be no benefit to be derived by an insolvent's obtaining his discharge after four years.

He cited *Re Van Zyl* (5 C.L.J., p. 205).

The Court granted the application.

De Villiers, C.J.: If the minutes of the meeting of creditors correctly represent what took place it is clear that the applicant who had a majority of votes in number and value ought to have been declared elected. The Magistrate, however, basing his decision upon an informal document not mentioned in the minutes, declared the respondent to have been elected as co-trustee with the applicant. The respondent's counsel now candidly admits that the document ought not to have influenced the decision, but he maintains that an error was made by the Magistrate in allowing creditors to prove debts incurred by the insolvent before a previous insolvency, and that if these creditors had been excluded the respondent would have had a majority of votes. More than four years had elapsed since the date of the previous sequestration and the question to be determined is whether the 17th section of Act 38 of 1884 was intended to prevent creditors under a former sequestration from proving their debts upon the insolvent estate for any balance still owing to them. This right was expressly reserved to them by the 130th section of the Insolvent Ordinance, and it is not expressly taken away from them by the Act of 1884. The 17th section of this Act enacts that "it shall not be lawful for any person to make application for the process of any Court for the civil imprisonment of any insolvent under the provisions of the 124th section of the said ordinance, or for leave to issue execution against any insolvent under the provisions of the 127th section," but it makes no reference to proofs of debts under the 130th section. Mr. Innes, however, relies upon the words which follow, "or to proceed in any manner against such insolvent." The context shows that the procedure thus forbidden is a procedure against the insolvent personally and the only argument in favour of the view that he would be personally affected by the proof of debt is that in case of the assets being more than sufficient to pay the liabilities, he would be entitled to the surplus. This is a remote contingency, however, which could hardly have been in the contemplation of the Legislature. If it had been intended that the lapse of four years from the date of sequestration should be equivalent to rehabilitation the Legislature would have said so. The 124th and 127th sections were specially mentioned in the Act of 1884, but nothing was said as to the 130th section. Under this section the creditors of an insolvent enjoy certain rights against his estate in the event of a subsequent insolvency and these rights they must be held to retain unless clearly prohibited by the Act of 1884. For the reasons already given I am of opinion that those rights were not abolished and that the proofs of debt in question were properly admitted. The applicant, therefore, had a majority of votes in number as well as in value and the application must be granted with costs.

Their lordships concurred.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

REGINA v. PLAATJE SIMON AND OTHERS. | 1896. Feb. 24th.

The Chief Justice said: My attention has been called to some irregularity committed by the Resident Magistrate of Tulbagh, which must be set right at once. A preliminary examination on a charge of storebreaking was taken against three prisoners, and the papers were sent to the Attorney-General in the ordinary course. Mr. Schreiner, who was then Attorney-General, sent a letter to the Magistrate to the following effect: [Case of Plaatje Simon, charged with the crime of storebreaking] "I have the honour to remit this case to the Resident Magistrate under Act 43 of 1885." Then there were also sent to the Magistrate a letter written by the Secretary to the Law Department, mentioning the names of the three prisoners, and stating that the Attorney-General remits under this Act the case against Plaatje Simon, and directing that when his case had been disposed of, to take his evidence against the two other accused. When the matter again came before the Magistrate he apparently misunderstood these instructions. He tried Plaatje Simon, found him guilty, and

sentenced him to twelve months' imprisonment with hard labour, and then proceeded to try the two others as if the case had been remitted against them also. He sentenced one of them to six months' imprisonment, and acquitted the other. Then the papers came before Mr. Justice Upington as Judge of the week. He confirmed the proceedings as against Plaatje Simon, but apparently the trial of the two others escaped him, so that there was no note upon the papers relating to them. The Magistrate then seems to have considered that all the proceedings had been confirmed, but somehow the Attorney-General's Office discovered the mistake, and submitted the papers to us to deal with them. We must deal with it as if the papers against the two other prisoners had now for the first time come before the Judge of the week. It is quite clear that the Magistrate had no jurisdiction. The instruction was that the case against Plaatje Simon was remitted under Act 43 of 1885, but it never says the case against the others was remitted; therefore the Magistrate had no jurisdiction to try under that Act. We must therefore quash all proceedings subsequent to the conviction and sentence of Plaatje Simon, so that the two other prisoners can be dealt with quite afresh. At the same time I would suggest that it would be better not to proceed against Jury Muller, who was acquitted, being found not guilty. Having been acquitted, it would not be right to try him again. As to George Jointjes, who was sent to prison, the fact will be taken into consideration that he has already undergone two months' imprisonment—all this taking place as far back as December last year.

CROESER V. CROESER. { 1896. Feb. 24th.

This was an action for restitution of conjugal rights, failing which for divorce on the grounds of the defendant's malicious desertion.

The parties were married in Cape Town in April, 1892, and the desertion took place in May, 1894.

Mr. Benjamin for the plaintiff.

The defendant was in default.

Mr. Norman Lacy, clerk in charge of the marriage record of the Colonial Office, produced a record of the marriage, Croeser and Spangenberg being the contracting parties.

Catherina Hendrika Croeser, the plaintiff, said her maiden name was Spangenberg. She was married at the Dutch Reformed Church, Cape Town, on April 4, 1892, and she and her husband lived at Somerset West Strand, and carried on a boarding-house. They got into difficulties, and she went to Cape Town in May, 1894, to meet the creditors. When she got back defendant had gone and had never yet returned. They had not been happy, and she had complained of his taking drink and neglecting his business. They were not married in community of property.

By the Chief Justice: She had received but one letter from him in answer to one that she had sent in June, 1895, asking to come back to him if he would forward the money. To that he had replied in an incoherent epistle. She lived with her parents now. She believed her husband was a barman at Malmesbury. He did not quarrel except when he got drunk.

The Court granted a decree for the restitution of conjugal rights, defendant being ordered to return to the plaintiff on or before April 15 next, failing which a rule *nisi* to be granted, calling upon defendant to show cause, on the 1st May, why a decree of divorce should not be granted with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

DU TOIT V. VAN DER SPUY. { 1896. Feb. 24th.

Pleadings — Exception — Insufficient plea — Nullity of Defence.

Where A. *in his declaration claimed from* B. *the sum of* £500 *as the purchase price of certain landed property and* B. *in his plea set up a two-fold defence that* A. *had failed to tender to him the necessary documents to pass transfer, and that* A. *had mortgaged the land.*

The Court, *after argument on exception by* A. *that the plea raised no sufficient defence in law, allowed the exception with costs.*

This was an action for £450 instituted by Abraham Stephanus du Toit, a farmer, residing at Langverwacht in the division of Oudtshoorn, against Herman van der Spuy, an attorney-at-law, residing in the town of Oudtshoorn.

The declaration alleged that (2) on the 18th June, 1892, the defendant bought from the plaintiff one half share of lot E (erroneously described as lot 3 in the deed of sale hereinafter mentioned) of the subdivided farm Langverwacht, and one-fourth of one-sixteenth share of the grazing veld on the said farm, together with certain water rights, for the sum of £500, on terms and conditions which will more fully appear from the deed of sale executed on the said date, a translation of which is hereunto annexed, marked A, and which the plaintiff prays may be considered as inserted herein.

3. Thereafter the defendant entered into possession of the said share of the said farm and is still in possession thereof.

4. Thereafter, in or about the month of June or July, 1893, the plaintiff and defendant verbally agreed that the above contract of sale should be so varied that plaintiff should retain the grazing veld therein mentioned, and the portion of the water rights obtainable from Vlei River Sloot, and in consideration thereof should release the defendant from payment of the sum of £50 as set forth in section (*b*) of paragraph 3 of the said deed of sale, but the other terms and conditions of the said contract remained in full force and effect.

5. The interest on the bond referred to in the 4th paragraph of the deed of sale is at the rate of 7 per cent. per annum on a sum of £450.

6. The defendant duly paid the interest on the said bond up to the 1st July, 1893, but has neglected and refused to pay the interest which has accrued since the said date though requested so to do by the plaintiff, and the said plaintiff has become liable for the said interest.

7. The plaintiff is ready and willing and has tendered and hereby again tenders to give transfer of the one-half share of lot E, of the farm Langverwacht with water rights from the Oliphant's River Sloot, on payment by the defendant of the sum of £450 in accordance with the deed of sale as varied by the agreement set forth in paragraph 4, but defendant refuses to pay the said sum of £450 in accordance with the said contract.

The plaintiff claimed:

(*a*) Judgment for the sum of £450 (the plaintiff to give transfer of one-half of lot E, of the subdivided farm Langverwacht, with the right to twelve hours' water from the Oliphant's River Sloot).

(*b*) Interest on £450 at the rate of 7 per cent. per annum from 1st July, 1893.

(*c*) Alternative relief and costs.

For an alternative claim, the plaintiff said as follows:

He craves leave to refer to the matters above set forth.

The defendant has failed to carry out his contract as above set forth while remaining in possession of the land above referred to, whereby the plaintiff has suffered damage in the sum of £100.

The plaintiff prayed:

(*a*) Judgment for the sum of £100.

(*b*) That the defendant be ordered to give up possession of the said portion of the farm Langverwacht and cancel the above-mentioned deed of sale.

(*c*) Alternative relief and costs.

The defendant, after admitting the formal allegations in the declaration, specially pleaded that the plaintiff failed and neglected to tender to the defendant the necessary documents to pass transfer of the land, but on or about the 6th September, 1894, mortgaged the said land together with other land belonging to him for the sum of £1,800 in addition to the mortgage of £450.

Thereupon the defendant, as he was entitled to do, gave notice to the plaintiff that he would not pay any further interest upon the said bond of £450, but that he would hold plaintiff liable for damages by reason of his failure and neglect.

The defendant has tendered and hereby again tenders to pay to the plaintiff the sum of £450, together with interest up to the date of the said notice, upon the plaintiff freeing the said property from the bond of £625 registered against the said property and tendering to him the documents and papers in order and ready for transfer in terms of the third condition of the deed of sale.

He admits that he paid interest up to July, 1893, and that he refuses to pay the said interest subsequent to that date, but he denies the other allegations in the 6th paragraph.

He denies that plaintiff has made the tender in paragraph 7 of the declaration set forth prior to the filing of the declaration, but says that he is willing to accept the said tender.

Wherefore subject to the above he prays that the plaintiff's claim may be dismissed with costs.

And for a plea to the alternative claim the defendant says:

He craves leave to refer to the matters above pleaded, and by reason thereof he prays that the said claim be dismissed with costs.

And in case the plaintiff should be unable to give transfer to the defendant, the defendant now plaintiff in reconvention says:

1. He craves leave to refer to the matters above pleaded.

2. He is willing that the said contract should be cancelled and that he should give up possession, on payment to him by the defendant in reconvention of the sum of £100, damages sustained by him by reason of his having effected improvements upon the said land of the said value.

Wherefore he prays, in the event of defendant in reconvention being unable to give transfer:

(*a*) That the said contract be cancelled.

(*b*) That the defendant be ordered to pay the sum of £100 as damages.

(*c*) Alternative relief, with costs of suit.

Before replying to the pleas of the defendant the plaintiff excepted to the same and said that they disclosed no defence in law to the claim of the plaintiff.

In case the above exception should be disallowed but not otherwise, then for a replication to the defendant's pleas the plaintiff said:

He admitted that there is a bond registered on the property in question in the sum of £650, but said that he was prepared to release the property from such bond as soon as defendant is prepared to take transfer. The rest of the replication was general.

For a plea to the defendant's claim in reconvention the plaintiff said:

1. He craved leave to refer to the matters set forth in his declaration and replication to the pleas in convention.

2. He is willing to cancel the sale as set forth in his claim in convention.

3. He denies that the defendant, plaintiff in reconvention, has effected improvements to the said farm.

Wherefore he prays that the claim in reconvention may be dismissed with costs.

The plaintiff having excepted to the plea as disclosingno defence in law to his claim,

Mr. Watermeyer was heard in support of the exception, which was sustained with costs.

The Chief Justice said: It is difficult to ascertain in this case what the real defence is. So far as one can judge from the plea, it is twofold—that there was a failure on the part of the plaintiff to tender to the defendant the necessary documents to pass transfer of the land. That fails when it is borne in mind that the plaintiff in his declaration, says "that the plaintiff is ready and willing, and has tendered, and hereby again tenders, to give transfer, &c." Here is a definite tender, and this definite tender would include a tender of the documents for the purpose of passing transfer. so that this objection fails. The next objection is that the plaintiff has mortgaged the land. This is no objection so long as the plaintiff is prepared to pass transfer. He may have made preparations to pay off the bond immediately that the defendant was ready to take transfer. The exception must therefore be allowed with costs.

Postea (March 2nd).

Mr. Watermeyer moved for judgment in terms of a consent paper now filed, the terms of which were:

(*a*) That the contract of purchase and sale be cancelled.

(*b*) That the defendant pay any interest now due, and the costs of the case.

Judgment in terms of the consent paper was given.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

McMUNN AND OTHERS V. POWELL'S EXECUTORS. { 1896. Feb. 24th.

Will — Construction — Election — Extrinsic Evidence.

A testator, married to his wife in community of property, treated the common estate as his own and bequeathed one-half thereof to his wife and the other half to his sisters. His wife died shortly after him and her heirs claimed, in addition to her half-share of the estate held in community, one-half of his share.

Held, *that if the heirs elect to hold the wife's share of community they cannot claim the benefit of the bequest.*

Held, further, *that in order to raise a case of election, it must appear on the will itself, by plain demonstration or by necessary implication, that the testator disposed of that which was not his own.*

This was an action instituted by Margaret McMunn, Matilda Fletcher, Ellen Powell, Lizzie Powell, and Mary Johnson against Messrs. Van Zyl & Buissinné and Andrew Johnson and G. W. Steytler, the former in their capacity as executors testamentary of the estate of the late John Powell, and the latter in his capacity as executor dative of the estate of the late Elsie Susanna Maria Powell, to have the plaintiffs' rights declared under the will of the late John Powell.

The declaration alleged that:

1. The late John Powell, in the year 1883, in this colony, married Elsie Susanna Maria Powell, now deceased, with community of goods.

2. Thereafter the said John Powell, in the year 1891, ceased to reside in this colony, and took up his residence in Dublin, where, on the 7th day of January, 1892, he made his last will and testament, copy whereof is hereunto annexed and marked "A," and where thereafter on the 8th day of January, 1892, the said John Powell died, leaving his wife aforesaid him surviving.

3. By his said last will and testament, the said John Powell intended and purported to dispose of the entire joint estate of himself and his said wife, which by the said will he purported to deal with and regard as his own,

4. With the exception of movable assets of the value of less than £30, situated in England or Ireland, and insufficient to pay the funeral expenses of the said John Powell and the debts there, the assets of the said joint estate, which were and are of great value, were and are situated either in this colony or the South African Republic, and included landed property situated in this colony.

5. The defendants Van Zyl and Buissinné, of Cape Town, were together with one Andrew Johnson, of Pretoria, in the South African Republic, by the said John Powell appointed by the said will trustees and executors upon trust, subject to certain legacies as to one-half of the joint estate for the said wife of the said John Powell, and as to the other half for the plaintiffs, who are the five sisters of the said John Powell in his said will mentioned and referred to.

6. The defendants Van Zyl and Buissinné and the said Johnson duly took out letters of administration in this colony, but the said Johnson is resident in Pretoria, South African Republic, outside the jurisdiction of this Honourable Court, and the defendants Van Zyl and Buissinné are the only executors testamentary of the said John Powell in this colony.

7. The defendant George William Steytler, of Cape Town, in his capacity as secretary of the Colonial Orphan Chamber and Trust Company, is the sole surviving executor dative of the aforesaid Elsie Susanna Maria Powell, now deceased.

8. The plaintiffs contend that, according to the true intent and meaning of the said will, the said Elsie Susanna Maria Powell and the plaintiffs together are respectively entitled to one-half of the entire joint estate of the said John Powell and the said Elsie Susanna Maria Powell, and that the said Elsie Susanna Maria Powell was not, nor is the defendant George William Steytler as her executor now entitled to receive both one-half of the said joint estate, by virtue of her marriage with community of goods and also one-half of the remaining half of the joint estate, but they contend that, in order that due effect may be given to the intention and purpose of the said John Powell, his widow, the said Elsie Susanna Maria Powell, and the said George William Steytler, as her executor, must in law elect either to permit the entire joint estate to be dealt with under the said will or to renounce the benefits intended and proposed to be conferred upon her by the said will and claim one-half of the joint estate by virtue of her marriage with community of goods.

9. The defendants Van Zyl and Buissinné have, however, framed liquidation and distribution accounts, by which they purport to award to the said Elsie Susanna Maria Powell and to the said George William Steytler, as her executor, one-half of the entire joint estate by virtue of her marriage with community of goods, and also one-half of the remaining half of the said estate, which they propose accordingly so to distribute that the plaintiffs shall receive only one-fourth of the entire joint estate, all which is in violation of the rights of the plaintiffs, and contrary to the true intent and meaning of the will of the said John Powell.

10. The plaintiffs have received certain sums of money on account of their succession under the will of the said John Powell, but there remain in the hands of the defendants undistributed assets sufficient to satisfy the lawful claims of the plaintiffs to one-half (subject to the legacies) of the assets of the said joint estate situate in this colony; but the defendants refuse to recognise or admit the said lawful claim of the plaintiffs, and the defendants Van Zyl and Buissinné refuse to amend the liquidation and distribution accounts accordingly.

Wherefore the plaintiffs pray that they may be declared to be entitled to one-half of the entire joint estate situate in this colony of the late John Powell and his now deceased spouse, Elsie Susanna Maria Powell, and that the defendants Van Zyl and Buissinné may be ordered so to amend the liquidation and distribution accounts as to recognise and give effect to the rights of the plaintiffs, or that they may have such further and other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

The defendants in their plea admitted paragraphs 1, 2, and 4 of the declaration, save that they said that Elsie Susanna Maria Powell died on the 9th January, 1892.

They said that the late John Powell was born in Ireland in or about 1830, and in or about 1855 came to this colony to practise his profession as a civil engineer, and became domiciled therein. In or about the year 1865 he went to India, where he remained until about the year 1868, at which date he went to Ireland for a visit. Eight months after he returned to this colony, where he remained until in or about the year 1883. He then went to Ireland on a visit, but returned to this colony in 1884, and remained here until 1890. In September, 1890, he left the Colony and went to Jersey, where he remained until August, 1891. He then went to Ireland, where he remained until his death.

They denied the allegations in paragraph 3 of the declaration, and for the terms of the will they craved leave to refer to the copy annexed to the declaration. They said that John Powell

was domiciled in this colony at the date of his marriage, which was in 1883, and that by virtue of the law of the community of property prevailing therein, he was unable to dispose by his said will of more than one-half of the joint estate.

As to paragraph 5 they admitted that the defendants Van Zyl and Buissinné were together with Andrew Johnson appointed trustees and executors of John Powell's will, but for the true intent and meaning of the will they referred to the terms thereof.

They admitted the allegations in paragraphs 6 and 7.

They said that the law of the domicile of the marriage, that is to say, the law of the Cape Colony, governs the distribution of the estate.

They admitted that the manner of the distribution of the assets of the estate was correctly described in paragraph 9 of the declaration, but they said that the liquidation and distribution accounts so framed were correct, and that the plaintiffs are only entitled to receive one-fourth of the entire estate in accordance with the law of the Cape Colony. They said that the amounts shown to be due to the plaintiffs were paid to and received by them without objection.

They admitted that they refused to recognise or admit the claims of the plaintiffs to one-half of the entire joint estate, and that the defendants Van Zyl & Buissinné refused to amend the said accounts, and they admitted that there still remain assets of considerable value in their hands awaiting realisation and distribution.

Save as above they denied all the allegations of fact and the conclusions of law in paragraphs 8, 9, and 10, and prayed that the plaintiffs' claim might be dismissed with costs.

The plaintiffs in their replication admitted that at the date of his marriage John Powell was domiciled in the Colony, which domicile he had however changed at the date of the will and of his death.

They admitted that they received without objection at the time of payment certain sums awarded to them upon the accounts framed and filed by the defendants Van Zyl and Buissinné, which amounts they now objected to as insufficient, and claimed to have supplemented out of the other available assets of the joint estate.

The remainder of the replication was general.

A consent paper was put in, which obviated the necessity of oral evidence.

The following is the text of the more important clauses in the will.

I, John Powell, of Upper Leeson-street, Dublin, do make this my last will:

Whereas I am seized and possessed of two farms, near Swellendam, near Cape Town, in South Africa, also five hundred and eleven shares in the Port Elizabeth Tramway Company, also of about two hundred and eleven shares in the City Tramway Company, Cape Town, and of one share in the Western Province Administration and Trust Company of Africa, also of several mortgage bonds on properties in Africa amounting to about thirteen thousand five hundred pounds, of which five thousand pounds thereof is under the management of Mr. Andrew Johnson, of Pretoria, I direct, &c. . . . Subject as aforesaid, I give, devise, and bequeath all my property of every description in the United Kingdom and in Africa to Messrs. Van Zyl & Buissinné, attorneys, of Cape Town, and to Andrew Johnston, of Pretoria, whom I appoint my trustees and executors, upon trust as to one-half thereof for my dear wife, Elsie Maria Powell, absolutely, and as to the other moiety or half thereof upon trust to divide same in equal shares among my five sisters, Mary, Margaret Catherine, Matilda, Ellie, and Lizzie.

Mr. Schreiner, Q.C. (with him Mr. Maskew), argued the case for the plaintiffs.

Mr. Innes, Q.C., and Mr. Searle, Q.C., for the defendants.

Judgment was given in favour of the plaintiffs.

The Chief Justice: I quite agree with Mr. Innes that it must appear on the will itself, by plain demonstration or by necessary implication, that the testator disposed of that which was not his own. He was married to his wife in community of property, and included in that property were certain farms, mortgage bonds, and shares. The testator commences the will with the recital that he is seized of these farms, bonds and shares, and he then proceeds to bequeath one-half of his property—the words are "my property"—to his wife and the other half to his sisters, the present plaintiffs. Reading the will as a whole and bearing in mind that the testator came to this colony from Ireland, and made his will in Ireland, I am satisfied that he lost sight of the community of property occasioned by his marriage in this colony and that he regarded all the property acquired by him as his own. By the words "my property" he meant all the property so acquired by him, although one-half of it had vested in his wife by virtue of the community of property between them. The testator's wife died shortly after him and the defendants, who are the executors dative of her estate, now claim her half-share of the common estate, and to that they are clearly entitled by virtue of the community, but they also claim one-half of his half-share

by virtue of the bequest in his will. The testator's intention was to bequeath one-half of the joint property to his wife; but as that half already belonged to her the legacy had no effect in law, for, as remarked in Justinian's Institutes "what is already the property of a legatee cannot still further become his" (*Inst.* 2, 20, 10). To hold that the defendants are entitled to claim the wife's half independently of, or rather in opposition to the will, and one-half of the husband's half under the will would completely frustrate the testator's intention. If they claim any benefit under the will they must adopt the whole of it and renounce their whole property or interest. If on the other hand they elect to hold their own property or interest intact they cannot have the benefit of the bequest. As was remarked in *Lucas* v. *Hoole* (Buch. 1879, p. 143), the principle upon which the doctrine of election is founded was not unknown to the Roman law. A testamentary heir, for instance, was not bound to accept the inheritance, but if he did accept it he could not refuse to pay or deliver the legacies to the legatees even if his own property was included among such legacies, whether or not the testator knew that it was the legatee's property. (*Voet*, 30, 1, 26.) So also where two or more legacies were left to a legatee, one of which was burthened with a condition, the legatee could not reject the one and accept the other unless such were clearly the intention of the testator. (*Voet*, 30, 1, 37.) This is an even stricter application of the doctrine of election than would be made by the law of England, where, according to Story (*Equity Jurisprudence*, section 1,081), a person may decline one benefit given him by a will, such as a legacy charged with a portion without being precluded from taking another benefit by the same will; unless it is fairly inferable, from the nature of the different benefits, that we should either take all or reject all. The doctrine of election has been recognised in numerous cases in this Court, notably in that of *Klopper* v. *Smit* (9 J. 167). It is founded upon clear principles of equity and has no other object in view than to carry out as far can be the testator's intentions, or at all events to prevent these intentions from being frustrated. In the present case it is evident that the testator's intentions would be entirely frustrated if the plaintiffs were to receive only one-fourth of the common estate, and the heirs of his wife one-fourth in addition to her own half. The judgment of the Court will therefore be for the plaintiffs, but the costs of the action may fairly come out of the common estate.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Sauer & Standen; Defendants' Attorney, J. B. Kayser.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

HODGSON v. THOMAS. { 1896. Feb. 25th.

Lunatic—Declaration by Court—Curator of person—*Curator bonis.*

T. *was for many years in the employ of* H. *as bookkeeper.*

After H. *had closed his business* T.'s *mental and physical state underwent a considerable change.*

The Court, *on the application of* H., *declared* T. *to be of unsound mind and appointed curators of person and property.*

This was an action to have the defendant declared of unsound mind, and incapable of managing his person and property.

Mr. Graham appeared for the plaintiff; Mr. Buchanan, as *curator ad litem*, for the defendant.

Mr. Charles Hunter Hodgson, until September last in business in Adderley-street, said that defendant had been his bookkeeper for a good many years. Towards the close of last year he noticed that the defendant certainly seemed to have undergone a change, his mind appeared to be constantly wandering. Although the business had been closed for some time, the defendant now continually came asking for the keys, and wanting to collect money, &c. Defendant lived in his own house, and was possessed of property worth fully £2,000. Witness knew Kassim Ali, who on one occasion took him to the defendant's house. There was no servant in the house, and the defendant seemed very ill. He went and fetched Dr. Scholtz, who examined him. Kassim Ali was now looking after defendant. He had to be washed, dressed, and looked after, and was now perfectly unfitted to look after his own affairs.

Cross-examined: The defendant was not violent. He wanted to sell all his property, but did not want to sell his shares. For the last six weeks Kassim Ali had cooked for him and attended to him generally, quite out of good nature.

The defendant was asked if he had any questions. He said all that he had heard was quite true.

John William Jupp, of 16, Orange-street, said he had known the defendant, his next-door neighbour, for many years. He had lately noticed a great change in the defendant's appearance. He had a habit of stopping people and mumbling. He walked in a weak, hesitating way in the middle of the street. He had been guilty of indecency, but seemed unaware that he was doing wrong. He was unable to speak coherently, and witness always tried to avoid him. He certainly thought someone should look after the defendant. One day in the middle of Long-street, defendant asked him what he had done with his beer, though he did not know that defendant had any beer.

Cross-examined: He had seen him accost dozens of people in the street. He did not stay with defendant long enough to make out anything he said, as he always got out of his way as quickly as he could.

Kassim Ali, Indian hawker, said he had known the defendant for many years. After Mr. Hodgson had given up business, he noticed a great change in defendant. He would consult witness as to what he should do, and seemed troubled that he had no work to go to. He seemed strange, and frequently he had seen him standing in the streets, where he would take up a position and stay there for an hour at a time without moving. He had taken pity on the defendant as he had no relations, and for weeks past had made food for him. He ate well when he could get anything. He was not clean in his habits. Sometimes the defendant would put a sausage, or a potato, without water, in a kettle and put it on the fire. Defendant had lucid intervals, but they were short, and his speech, one moment quite sane, would lapse the next into incoherency. He sometimes addressed witness by wrong names, quite mistaking him for someone else.

The defendant was asked by the witness if what he had said was not true, and defendant, in a weak way, said witness had cooked for him, but had not washed him. Witness, however, said he had washed him.

Dr. W. C. Scholtz said he had frequently attended the defendant. He remembered that for the last year the defendant's mind had been gradually getting weaker. He was now labouring under delusions. He had lately grown distinctly worse, and often failed to recognise witness, though they had been acquainted for years. Sometimes he spoke coherently but would quickly lapse into incoherence. He was practically getting imbecile, and it would be a good thing if he were sent to Valkenberg, because he was starving himself. He had examined defendant and up to the last month he had noticed a rapid failing in bodily health, but that was because he was starving himself before Ali took pity on him. His mind was depressed at losing his position through Mr. Hodgson giving up business.

Cross-examined: He was certain that defendant's disease was imbecility, and not mere mental aberration of a temporary kind brought on by miserly living. He considered the defendant's condition one of predisposed melancholia brought on by having to leave his master's employ, where he had been for many years.

Dr. David B. Hewat said he had examined the defendant on February 15. He had gone to defendant's house, and found the door locked, and defendant climbing out of the window. He said he would open the door for the witness, but he not doing so for some time, witness climbed in at the window, and defendant offered him a chair. He had a conversation with him, and he said he was still at business, Mr. Hodgson still carrying on the store. He said he knew there was going to be a change. He said he was thirty-three years of age, which was obviously wrong. He said his stepson was living with him in the house. Before leaving him he noticed a great change in his manner, his speech wandering very much. The man was certainly mentally deranged. He went to see the defendant at the request of Dr. Scholtz. He had certified that the defendant was of permanent unsound mind, and not likely to improve.

Mr. Buchanan said he had visited the defendant's house, and had also been compelled to climb through the window. He had a long conversation, at times finding him speaking quite lucidly, whilst at other times he would talk incoherently. The house was generally dirty, and the defendant was of dirty personal habits. There were a dozen full bottles of beer in one of the rooms. In one of the corks was stuck a gimlet, and he asked the defendant why it was there. The reply was that he was afraid that the bottle might burst. He told the defendant to attend the Supreme Court to-day, and he made a memorandum. Witness examined the memorandum, which stated, "Friday, February 25. *Re* Worcester shares

and dividends" He got him to alter the memo., but a moment afterwards he had forgotten all about it.

The Court declared the defendant to be of unsound mind, and appointed Mr. Hodgson curator of his person, and Mr. G. W. Steytler, in his capacity as secretary of the General Estate and Orphan Chamber, as curator of the property on the usual terms.

[Plaintiff's Attorney, C. C. Silberbauer.]

QUEEN v. SHAW. { 1896. Feb. 25th.

Judgment—Interlocutory sentence—Definitive sentence—Mistake—Jurisdiction—Alteration of judgment.

A prisoner, before being arraigned on a charge of theft, objected to being tried on the indictment on the ground that the place where he was committed for trial was outside the limits of the district of the committing Magistrate. The presiding judge sustained the objection but, upon its being proved before him on the same day that the objection was founded upon a mistake of fact, he ordered the trial to proceed. Notice was accordingly given to the prisoner that he would be tried on the following day on the same indictment.

Held, *upon a question reserved after conviction and sentence, that as the order sustaining the prisoner's original objection was interlocutory and incapable of being appealed against, the presiding judge had the power to correct his own order.*

This was an argument on certain points reserved under Act 5 of 1879, section 25, for the consideration of the Supreme Court.

The prisoner was tried and convicted at the last Criminal Sessions held on 20th January last, on the charge of theft of eighteen lamps from the Railway Department. Before the prisoner was arraigned, his counsel put in a certified copy of the warrant of committal, dated 6th December, 1895, and took the objection that there had been no due committal, the only committal having been made outside the jurisdiction of the Court of the Resident Magistrate of the Cape.

After hearing counsel for the Crown, who admitted that the committal referred to was outside the jurisdiction of the said Court, the objection was sustained. The prisoner was committed at his own house by the Assistant Resident Magistrate of Cape Town, and on the morning of the trial both the prisoner and the Crown were under the impression that Shaw's house was situate outside of the jurisdiction of the Resident Magistrate of Cape Town.

After the objection had been sustained it was discovered that the limits of the Cape Town district had been extended by a recent Proclamation.

Afterwards, on the day fixed for the trial, 20th January last, at 2.30 p.m., counsel for the Crown having called evidence to prove that prisoner was committed for trial within the jurisdiction of the Court of the Resident Magistrate of the Cape, and counsel for the prisoner having objected to this evidence being given in the absence of the prisoner, and on the ground that his objection as to the wrongful committal had been sustained by the Court after admission by the Crown, the learned Judge who presided at the trial overruled the objection, and ordered the trial to proceed.

On the same date (20th January) notice was given to the prisoner that he would be tried on the indictment on the 21st January, 1896.

On the 21st January, 1896, before the arraignment of the prisoner, his counsel put in a copy of the notice of trial, dated 20th January, 1896, and stated that the prisoner did not accept short service on that notice.

The prisoner, being arraigned, pleaded not guilty, and handed in the following written plea: "I, Thomas Wright Shaw, of Observatory-road, with great respect to this Honourable Court, humbly submit that I cannot legally be called upon to plead to the indictment before the Court, but should this Honourable Court overrule this my objection, I beg, subject to the above protest, to enter a plea of not guilty.

The jury found the prisoner guilty, but strongly recommended him to mercy on account of the laxity of the officials of the Railway Department, and he was sentenced to four months' imprisonment.

Upon the motion of the prisoner's counsel, the following two points were reserved for the consideration of the Supreme Court:

1. Whether evidence as to the Resident Magistrate's jurisdiction as to committal for trial can be given:

(*a*) In the absence of the prisoner.

(*b*) The Court having sustained objection to trial on the original indictment.

2. Whether trial could proceed when prisoner did not accept short service of second notice of trial.

Mr. Innes, Q.C., now argued these points on behalf of the prisoner.

Mr. Giddy for the Crown.

The points reserved were decided against the prisoner.

The Chief Justice said: Before the prisoner was arraigned his counsel objected to the trial on the ground that there had been no due committal for trial, inasmuch as the Resident Magistrate, who purported to commit the prisoner, had no jurisdiction. Counsel was instructed to state as a matter of fact that the prisoner's residence, where he had been committed, was not within the jurisdiction of the Magistrate of Cape Town, and the Public Prosecutor admitted the statement to be correct. The presiding judge accordingly sustained the objection to the trial proceeding on the indictment. On the same day it was discovered that the prisoner's residence was within the limits of the Cape Town district, and the prosecutor tendered evidence of this fact to the presiding judge. The prisoner had then left town, but the learned judge allowed the evidence to be given and ordered the trial to proceed. Notice was accordingly given to the prisoner that he would, on the following day, be tried on the original indictment. After he had been convicted and sentenced the following questions were reserved for the opinion of this Court: (1) Whether evidence as to the Magistrate's jurisdiction could be given (*a*) in the absence of the prisoner (*b*) after the Court has sustained the objections to the trial; and (2) whether the trial could proceed when prisoner did not accept short service of the second notice of trial. It is not denied on the part of the prisoner that the statement made by his counsel, which induced the presiding judge to hold that there had been no proper committal for trial, was incorrect. The judge having been so misled upon a question of fact was quite justified in accepting evidence of the mistake and no possible prejudice could be occasioned by this course to the prisoner, who was the cause of the mistake and is bound now to admit the mistake. The circumstance that he was absent when the evidence was given cannot invalidate the subsequent proceedings at which he was present, and at which he was bound to admit the correctness of the evidence thus given. The more important point is that when this evidence was given the learned judge had already sustained the objection to the trial. If he could correct his own decision then he certainly could admit the evidence tendered. Now what was the nature of his previous decision? He sustained an objection to proceeding with the trial because there had been no due committal of the prisoner. It was an interlocutory order because the decision was not on the merits of the case, but upon a preliminary question of procedure which could not possibly affect the question of the prisoner's guilt or innocence. *Voet* (42, 1, 4) defines an interlocutory sentence as being *pronunciatio aliqua de plano, super incidenti aliquo in principio vel medio litis facta causam principalem non plene determinans.* Now the rule is that a definitive judgment once pronounced by an inferior Court and duly recorded cannot be altered even by such Court itself without the consent of all the parties to the suit. The superior Courts have the power of correcting judgments of the inferior Courts either by way of appeal or by way of review under the 32nd section of the Charter of Justice, and the 4th and 5th sections of Ordinance 40 of 1828. In cases not admitting of such appeal or review but giving rise to the remedy of *restitutio in integrum*, the Supreme Court retains the power enjoyed by the former Supreme Court of Justice to grant and enforce that remedy. In the same way the Supreme Court retains the power to correct its own judgments upon any of those grounds which would justify a decree of *restitutio in integrum*, such as fraud practised in the Court, or mistake appearing on the face of the record (*In re Richardson*, 1 Mens. 423.) As to interlocutory judgments, they can be corrected even by inferior courts unless they are capable of being appealed against to one of the superior Courts of the Colony. The order now in question was not made by the Supreme Court as such, but it was interlocutory and there could be no appeal against it to the Supreme Court. The presiding judge, therefore, had the power to rescind it and order the trial to proceed on the original indictment which has never been quashed. The original notice of trial on that indictment still held good and the objection of short service also falls to the ground. The questions reserved must therefore be decided in favour of the Crown.

Mr. Justice Buchanan concurred. He said: What weighed with me at the trial was whether the prisoner would be prejudiced or not. Personally, I should have preferred to have postponed the case, but there was an application made by the Crown to proceed, and I felt bound, after the mistake had been explained, to allow the case to proceed, in the total absence of prejudice to the prisoner.

Mr. Justice Maasdorp also concurred. He said: I think Mr. Innes was correct in his argument that the order in the first place being made, it would necessarily have had the effect of postponing the trial for that session, and, consequently, in the face of that order, the prisoner could not be called upon

to plead. But so soon as that order was rescinded, and the Court could rescind that order, the proceedings were in exactly the same position as before. There was then no necessity for giving further notice, and the notice given may be taken as an intimation with regard to the prisoner's position. It is admitted that whatever the effect of those proceedings had been, they had not prejudiced the accused. There being no prejudice to the prisoner, the amendment of the order could not have the effect of invalidating the subsequent proceedings.

[Appellant's Attorney, D. Tennant, jr.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

HENRY AND CO. v. CLARKE AND CO. { 1896. Feb. 27th.

Provisional sentence—Bill of Exchange—Failure of consideration—Negligence of acceptor—Costs.

Where the acceptor of a bill of exchange took no steps to repudiate the goods which were to be the consideration of the bill but which were not according to order, and did not inform the plaintiff of his intention on account of such failure of consideration to dishonour the bill on presentation for payment,

Provisional sentence *was given with costs, there having been no tender by defendant on the due date of the bill of such portion of the amount of the bill as he admitted in the action to be due.*

This was a claim for provisional sentence on a bill of exchange for £78 0s. 4d., accepted and subsequently dishonoured by the defendant.

The defence was failure of consideration to the amount of £21, being the price of certain paper not delivered according to sample.

Mr. Schreiner, Q.C., moved.

Mr. Searle, Q.C., for the defendant.

Mr. Schreiner said that the plaintiffs admitted that the paper sent was not that which had been ordered. The paper came in two lots, one a month after the other. But though the defendant had seen the first consignment he accepted the bill and had accordingly put himself in a position whereby, by all rules of commercial law, he must pay.

The Court granted provisional sentence on the bill, less £25, with costs.

The Chief Justice said: The defendant received the two invoices of the paper at the same time, and I think that he might fairly have been led to believe, according to the goods sent by the S.S. Pondo, that the goods sent by the other two ships would also not be strictly according to order. But notwithstanding this knowledge he accepted the bill in suit, and kept the goods from August 14, when the acceptance was made, until the following November, when the bill became payable, and meanwhile took no steps to repudiate the goods. The least I think he could have done would have been to inform the plaintiffs as soon as he discovered that the goods were not according to sample, that he would dishonour the bill when presented, and afterwards when the bill was presented the defendant should have tendered the amount which he now admits to be due. Not having tendered that amount he must bear the costs of this action. Judgment therefore will be given for £78 0s. 4d., less £25—which is made up of £21, the value of the goods not according to sample, and £4 expenses upon them. Judgment for plaintiff for £53 with costs, defendant to return the lumberhand paper which is not according to sample. The same to be received by the plaintiffs' agent at the defendants' stores.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendants' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

LITHMAN V. PEPLER.

Mr. Close applied for provisional sentence on a promissory note for £50 7s. 6d., value received, less £9 paid on account.

Provisional sentence was granted with interest and costs.

WOOD V. LE GRANGE.

Mr. Tredgold applied for provisional sentence on a promissory note for £86 18s. 6d., with interest at the rate of 10 per cent. per annum, less £16 paid on account.

Provisional sentence was granted as prayed.

WOLFE V. PERRINS.

This was an action for debt and shares.

Mr. Searle and Mr. Tredgold appeared, and judgment was asked in terms of a consent paper.

Judgment was granted as prayed.

GENERAL MOTIONS.

KUUN V. HARRIS.

Application by the plaintiff for an order removing the trial of the suit between the parties to the Circuit Court about to be held at Victoria West, on the ground that the witnesses reside in that district and that it can be more conveniently tried there than in the Supreme Court.

Mr. Innes, Q.C., appeared for the applicant, and Mr. Graham appeared for the respondent.

The Chief Justice said: The balance of evidence seems to be in favour of the trial being held at Victoria West. The greater number of witnesses reside there, and what is more important, the case will, if tried at Victoria West, be tried quite six weeks before it could possibly be tried in Cape Town. The application for trial at the Victoria West Circuit Court will therefore be allowed, the costs of this application to be costs in the cause.

JONES V. TOWN COUNCIL OF CAPE TOWN. { 1896. Feb. 27th.

Prescription—Town Council—Public square—Stoep.

The owners of a house in Cape Town occupied and let the rooms in a structure adjoining the house but encroaching on a public square.

Held, *that the fact of the roof of the structure having been used by the owners as a stoep did not prevent prescription from running as against the Town Council which had control over the square, and could with the consent of the Governor alienate it.*

Held further, *that a right thus acquired by prescription affords a cause of action as well as a ground of defence.*

The declaration alleged (2) that the plaintiff is the registered owner of a certain piece of land with buildings thereon situated at the corner of Grave-street and Church-square, Cape Town, being part of lot 2, block K, and being 10 square roods and 62 square feet in extent.

3. The title to the land immediately adjoining the limits of the said property so registered in plaintiff's name on the Church-square side of the said property is vested in the defendant Council, and has been vested in it and its predecessors in title since the year 1828 and for a longer period prior thereto.

4. For a period far longer than the period of prescription, the plaintiff and his predecessors in title have uninterruptedly and as of right occupied and built upon a strip of ground adjacent to the limits of his said registered property and facing Church-square. The said piece of ground is 50 feet in length along the Church-square frontage and is 10 feet broad. It forms portion of the land of which title is vested in the defendant Council as aforesaid, and portion of a building in the occupation of, and belonging to, the plaintiff stands upon it, and has so stood for a period far longer than the period of prescription.

The plaintiff attaches thereto a plan showing the plaintiff's registered property, and showing the position and extent of the strip of ground aforesaid; the property registered in the name of the plaintiff is marked "A" and the strip of ground hereinbefore mentioned is marked "B" on the said plan.

5. By reason of the matters hereinbefore stated, the plaintiff has acquired by prescription the ownership of the strip of ground aforesaid, and he is entitled to claim transfer from the defendant Council of the said strip into his own name.

6. The plaintiff has always been, and is now, ready and willing to do all things necessary on his part to effect such transfer, and hereby offers and tenders to pay all costs and expenses lawfully necessary in connection with the said transfer.

7. The defendant Council maintains that the plaintiff is not the legal owner of the said strip of ground, and is not entitled to claim transfer as aforesaid, but it claims that it is entitled to the ownership of the ground and refuses to pass transfer thereof to the plaintiff.

The plaintiff claimed:

(*a*) An order declaring that the ownership of the said strip of ground, marked "B" in the plan annexed, is vested in him and that he is entitled to transfer thereof.

(*b*) An order compelling the defendant Council to do all things on its part which are necessary to effect transfer of the said ground to the plaintiff, he tendering as aforesaid to pay all costs of transfer.

(*c*) Alternative relief.

(*d*) Costs of suit.

[The exceptions taken by the defendant Council to this declaration, with the argument and judgment thereon, will be found at 5 Sheil, 27.]

On the 4th and 6th February, 1895, the matter was last before the Court, when the arguments on the exceptions taken to the declaration were heard, and decided against the Town Council. (See 5 *Sheil*, 27.)

The defendant Council in their plea admitted the allegations in paragraphs 1, 2, 3, 6, and 7 of the declaration, except that they denied that the title to the land in dispute was vested in them previous to the passing of the Act 87 of 1892, saying specially that its ownership of the strip of land in dispute is statutory, and is conferred upon it for public municipal purposes only, and without power of alienation without the consent of His Excellency the Governor first had and obtained, and further, that no grant of the said strip of land has at any time been made wherefrom by law a transfer of the said strip of land could be effected.

As to paragraph 4, the defendant Council denied that the occupation of the said strip of land by the plaintiff and his predecessors had been of right, and that any portion of a building in the occupation of the plaintiff other than the stoep thereof, stands or has stood as in the said paragraph alleged upon the said strip of land, but the Council admitted the other allegations in that paragraph.

The allegations in paragraph 5 were denied.

The defendant Council further said specially that in January, 1893, the plaintiff then for the first time alleging himself to be entitled to the said strip of land, requested the defendant Council, in case he should demolish his existing building, to approve of his erecting a building upon the strip of land in suit, upon which now stands the stoep aforesaid, which request the defendant Council, as it lawfully might do, declined and refused to grant, intimating that the frontage of any such proposed new building should not extend beyond the boundary of the plaintiff's property so as to be in line with adjoining houses or buildings.

The defendant Council finally submitted that even if the Court should find that the plaintiff is by prescription entitled to maintain his occupation of the said strip of land, such occupation can only be maintained in accordance with the established use thereof, subject to the Municipal regulations, as a site for the defendant's stoep, and not as a site upon which the plaintiff may lawfully erect or build any new building at his will.

Issue was joined on the replication, which was general.

Mr. Innes, Q.C., and Mr. Jones appeared for the plaintiff.

Mr. Schreiner, Q.C., Mr. Searle, Q.C., and Mr. Graham for the Town Council.

Mr. Innes called, for the plaintiff:

Mr. John George Steytler, who said that he had resided in Cape Town for many years. He knew the premises in question in Church-square. He was at school there between 1837 and 1841. The stoep was the same then as now, except that a small buttress had been placed at the doorway under the stoep about 1858, to strengthen it. On the other side, in Grave-street, were offices used as the printing office of the Cape Town "Mail" at the time that it was first printed.

Cross-examined: In the stoep structure was a little window from which slips of the "Mail" were sold. There were some cases in Cape Town where the main entrance to a building was from the stoep, and the rooms under the stoep had not communication with the other part of the house. In 1837 Mr. Buchanan owned the house in question.

Re-examined: The vast majority of stoeps in Cape Town were low stoeps without hollows under them.

By the Court: In 1837 the stoep was the exclusive property of the owners of the house. It was a private stoep, and could not be used by the public.

Mr. William G. Lucas, Examiner of Deeds, said he had no knowledge of any actual grant of land to the Town Council in Church-square. Transfer was made by the Town Council of portions of land in Canterbury-street. The Governor's authority was obtained and transfer passed on the power of attorney of the Council.

Cross-examined: He knew at least one instance of such transference. There had been a portion of Canterbury-street transferred to bring up the line of the street, be believed. That was done under Act 45 of 1882. Transfer had been passed since he had been Examiner of Deeds. He had no plan of the town in the Deeds Office, and did not know if there was waste land in the Municipality. He knew there had been several instances of transfer by the Municipality. He produced duplicate original diagram and title of the property held by plaintiff.

Lam Jonas (a Malay), a carpenter, said he learned his trade in Church-square. He was born in 1820, and was apprenticed when eighteen years old. He remembered the house in question. The stoep still standing there now was there then. Under the stoep the rooms were used as shops and workshops. The owner of the building let the rooms under the stoep. By entering under the stoep from Church-square, and passing under the house, entrance could be obtained from the back to the house by a ladder.

The apprentices working in Church-square used to sit on the steps of the stoep waiting for their hours of work to commence.

Mr. John James Art said he was sixty-four years of age. He used to go to school at the house in question in 1839 or 1840. The stoep was the same then as now. He remembered the rooms under the stoep being used as a stone-cutter's shop and printing office.

Mr. Frederick Rutherfoord said he had also been to school at the premises in question in 1835. He corroborated the previous evidence.

By the Chief Justice: The stoep was a private one in the old days.

Mr. Charles Tennant Jones, the plaintiff, said he was owner of the property in question. The registered title did not cover the whole of the land occupied by the building and stoep—the stoep being outside the diagram. He purchased the property in 1884. The premises under the stoep had been occupied as an office and a stone-mason's shop for many years, and brought in a rental of £5 per month. He had had correspondence and interviews with the Town Council on the matter now before the Court, to endeavour to come to terms amicably. He wanted to build a new building and wanted to erect up to the line of the stoep, or be compensated for the land covered by the stoep. At first he would have been willing to accept £500 as compensation if there had been no legal proceedings. Afterwards he sent in a claim for £750 for compensation. The Council would not allow him to build, though he had Messrs. Lawley's consent to building out to the extent of the stoep. Mr. Smart had said that the land in question was of no value, but they could not let him build on it because he had no title. If he had the full area he would be able to put up a much more handsome building than he would if the width of the stoep was deducted from the land on which he could build.

Cross-examined: He had received no notice from the Council calling upon him to remove the stoep.

For the defence, Mr. Schreiner called

Mr. Thomas Wilson Cairncross, late City Engineer of the Town Council, who said he knew the property in question. Within an area of quarter of a mile, bounded by Adderley-street, Strand-street, Bree-street, and Wale-street, there were 205 stoeps, and a good many had been pulled down in that area. In most of these instances the stoeps were an encroachment on the street. They were all old stoeps, and several were hollow underneath, the space being occupied in some instances for business purposes. The stoep of the property in question prevented the making of a continuous footway on that side of the square. Messrs Lawley & Co. had been prevented from building out to the extent of their stoep.

Cross-examined: Any obstruction in the street above 9 inches in height was considered a stoep. Messrs. R. M. Ross & Co.'s place recently removed in Strand-street was really a stoep, although occupied as a portion of their store. If Mr. Jones pulled down his stoep according to the regulation he could not rebuild. Where the stoep had been within a man's own boundary, the Council did not consider it as coming within the regulation.

Mr. James Wm. Attwell, Mayor of Cape Town, said he was born in Cape Town. He corroborated Mr. Cairncross, but added that in the case of a stoep upon a man's own land the matter would be referred to the committee, who would then expropriate and would not allow any projection outside the building line of the street. The Council would not permit Mr. Jones to erect a building encroaching on the square.

Cross-examined: It would reduce the light to Mr. Findlay's shop if Mr. Jones built out to the limit of the stoep. If a man had title to the ground on which his stoep was built and the Council did away with the stoep, they would compensate him, but he would not be agreeable to compensate for land obtained by prescriptive right. He had tried to settle the matter amicably with Mr. Jones, but he could not get on with him at all. He believed the Council would have given £250 as compensation, and he for his own part would have even advised going so far as £500 if Mr. Jones had shown any sign of willingness to accept that amount.

Mr. John Woodhead, member of the Town Council, said he had known Cape Town for thirty-five years. He said that if Mr. Jones was allowed to build as he desired on Church-square the present occupier of the stoep by the Baptist Chapel could build right out into Wale-street. He had told Mr. Jones that he would guarantee to carry a resolution through the Council making him a compensation of £250 for the stoep. He believed the Mayor would guarantee a vote of £500 for compensation. He did not agree that arbitration was always satisfactory. They had advanced the value of the property of Mr. R. M. Ross, and had to pay £50 for doing so. He was not willing to give title to the land occupied by the stoep, because that would allow plaintiff to build.

Mr. George Smart, ex-Mayor of Cape Town, corroborated most of this evidence. He said that when a man who had had an encroachment pulled it down himself, he lost the right to the

encroachment; but if the Council wished the alteration, they were willing to pay compensation.

Cross-examined: The line of buildings defined the line of the street, but if there was an irregular line, the Council would define a straight line. The transfer of land in Canterbury-street had been that of what was formerly waste land until the Council formed the street out of a deep ditch.

Mr. Lucas (recalled) said he could not say whether the land transferred by the Town Council in Canterbury-street was waste land or portion of an old street.

Mr. Cairncross (recalled) said that he had defined the line of Canterbury-street, and the land transferred was waste land. A plan of 1819 showed Church-square to be 10 feet wider than it now was, though he could not say from the plan on which side of the square the encroachment was.

By the Chief Justice: The plan might be in error.

Mr. H. C. V. Leibbrandt produced from the archives a copy of the Instructions to the Burgher Council of 1804.

Mr. Innes, Q.C., for the plaintiff urged that the evidence on paragraphs 3 and 4 of the plea was not relevant to the issue.

Chief Justice: Will not a declaration of ownership be sufficient for you? There might be considerable difficulty in ordering transfer to be passed by the Council.

Mr. Innes: As between ourselves and the Town Council the position would be clear if we had a declaration of rights even without transfer.

Chief Justice: In the case of a private individual if he refuses to give transfer when the Court orders it, we order a direct act to be done, viz., transfer to be passed by the Sheriff on his behalf. But if we order the Town Council to give transfer, it is an order to do an indirect act, viz., to apply to the Governor for leave to transfer, and if the Council won't apply we can only commit them.

Mr. Innes: Yes, but the Court might make a precedent in practice and arrange for some convenient procedure. As to the case itself—the three main points are:

1. Can ownership be acquired by prescription. The decision on the exception recently argued, however, settles this in the affirmative.

2. Has Mr. Jones acquired it by prescription? The evidence of old inhabitants is that for over forty years past, the stoep has undoubtedly been used as of right and the ownership has thus been acquired.

3. Can Mr. Jones claim transfer? Now there are two objections raised in the defence—that the consent of the Governor is required, and that there is no grant of the land on which to give title. But it is immaterial whether the land is street or square or waste land—there is no grant in either case. Yet there is machinery in the Deeds Office for giving transfer of waste Municipal land, the practice there being to give transfer (though there is no grant) merely on the Governor's approval, and on the Mayor's signing the power-of-attorney. Therefore this could certainly be done in case of street or square.

Mr. Schreiner, Q.C., for the defendant: The first point is—what is the legal position of the strip (10 feet by 40 feet) claimed? Now the *dominium* is in the Crown and must be extracted, usually by grant but often by statute. In this case there is no grant, and no statutory title in the streets and squares existed until Act No. 87 of 1892. If plaintiff had sued say in 1891, he would therefore have had to join the proper Government Department. But in 1892 for the first time the title is vested in the Municipality, and therefore in the recent argument on exception in this case no exception could be taken to the non-joinder of the Government. How far then did this Act prejudice the position of the Municipality before 1892? Every other Municipality but Cape Town has had a vesting clause—the ownership remaining in the Crown and merely the control being lodged in the Municipality. (Section 3 of Act No. 26 of 1882.) So that up to then the plaintiff could be in no better position than anyone attempting to prescribe against the Crown. The possibility of such prescription has often been discussed but there is no decided case based specifically on prescription save *Blanckenberg* v. *Colonial Government* (4 Sheil, 61). In *Barnard* v. *Colonial Government* (5 J. 122) and *Barrington* v. *Colonial Government* (4 J., 408), prescription is only touched upon. Now Blanckenberg had the *justus titulus* which usucapion required, prescription being divided into two forms, viz., usucapion and limitation of actions. Usucapion required the fulfilment of certain stringent conditions, but not all of them are required for limitation.

Chief Justice: I cannot understand why your clients abandoned their appeal on this very point when you gave notice of appeal, after the decision of the Court when it was raised on exception. Every point the defendant now raises could have been raised on appeal.

Mr. Schreiner: Because it would be better to appeal on the full record. The Court will not in any way stultify itself because the question

of the distinction between prescription and usucapion was not then raised. As to this see (*Voet*, 13, 7, §7).

Chief Justice: There is no distinction between prescription and usucapion in our law, and the Land Beacons Act, No. 7 of 1845, fixes the period at thirty years in regard to land.

Mr. Schreiner: The authorities do not indicate that the distinction has vanished. (*Burge*, Commentaries, Book III., Chap. 10), and if usucapion exists, it requires just title. Now there is no error in Mr. Jones's title, and the plan produced by us shows exactly what we claim.

Chief Justice: *Voet* says these subtleties are done away with and that prescription and usucapion are the same.

Mr. Schreiner; But prescription is a mere defence and all the cases have been on this line (except only *Blanckenberg's* case), *Voet* and *Schorer* do not say that a person can claim title thereunder. There is no authority for compelling transfer upon a declaration of rights obtained by prescription.

Chief Justice: These people publicly occupied the vaults under the stoep for forty years. We must at least presume there was occupation *nec vi nec clam nec precario.*

Mr. Schreiner; By our law Mr. Jones should have looked at the title deed and diagram in the Deeds Office. It was his duty, and he buys only what is registered. The title is itself notice to him of encroachment. What Mr. Jones has acquired at most is his right to occupy as he has occupied, *i.e.*, that he cannot be ejected but he has no *dominium*. Such occupation is not inconsistent with the character as a stoep, and Mr. Jones cannot build up higher than the stoep now is. (See *Voet*, 44, 3, 11, *Sande* "Restraints on Alienation," Mr. Welsber's translation, page 128.)

The Chief Justice said: The decision of the Court in the present case will not affect any of the rights of the Town Council under their Municipal regulations. If the plaintiff be declared to have acquired rights of ownership in respect of the strip of land in question, those rights are subject to the same obligations as the rights of any other owner of land within the limits of the Municipality: he may not raise the existing structure or erect a new building upon it otherwise than in accordance with the existing regulations of the Municipality. It is common cause that the structure, which covers an area of fifty by ten feet, originally encroached upon Municipal land. It was occupied by the plaintiff's predecessors in title as far back at all events as the year 1895 and it is still in his occupation. The roof of the structure is and has always been enclosed by an iron railing and exclusively used by the plaintiff and his predecessors in title as a "stoep" or place for sitting and promenading upon. Underneath this stoep are rooms used as offices which the plaintiff has let to tenants, and for which he has received a rental of £60 a year. That these rooms have been so used by the plaintiff's predecessors in title for upwards of sixty years is clearly established by the evidence and indeed is not denied on the part of the defendants. Lam Jonas, an old man of seventy-six, says: "The stoep as it is now was there as long as I can remember. There were always rooms there. Cairncross hired them and I worked in the rooms under the stoep. These have always been used by the owner of the houses as part of the house. The rooms were let by the owner." The occupation was peaceable, open and as of right—*nec vi nec clam nec precario*, and no requisite was wanting for the acquisition of the just and lawful right to the ownership of the land thus occupied. Mr. Schreiner, however, strennously contended that the plaintiff ought to fail for two reasons, because the roof of the structure was used as a stoep and because title by prescription can only be relied upon as a defence and not as a distinct cause of action. Neither contention appears to me to be tenable. It is quite true that the roof served only as a balcony which the owners of the house used for walking or sitting on, but it was railed in and used by them to the exclusion of the public. If this had been the sole use of the structure there might have been some ground for holding that the owners of the dwelling-house had acquired only a servitude on the land, though I wish to guard myself against expressing any opinion on the point. But the structure also served all the purposes of a house and was always treated as part of the dwelling-house. Although the offices are low, they open on to the level of Grave-street and Church-square, and were always used as any other offices in the town might be used. There surely could be no more unequivocal exercise of ownership than the occupation and letting of these offices for all these years The offices have been spoken of as mere "hollows" underneath the stoep but so, in one sense, are ordinary rooms under the roof of any other house. Even if it be true—and of this there is no evidence—that the main object of the structure was to provide a promenade for the owners of the dwelling-house, yet if they utilised the space underneath for purposes of more useful and profitable occupation the present owner is entitled to the legal benefits resulting from such occupation. But, in the

next place, it was contended that even if the plaintiff has acquired a prescriptive right he can only avail himself of such right by way of defence and cannot himself bring an action to enforce or declare his rights. This argument would have been more fitly employed in support of the defendants' exceptions to the declaration, but it is quite inconsistent with the judgment of the Court overruling those exceptions. Leave to appeal against that judgment was duly given, but after the reasons of the judges had been prepared for the Privy Council the appeal was withdrawn. I have nothing to add to my reasons except to refer to the provisions of Act 28 of 1881. The second section enacts that "any person who shall by prescription . . . . have acquired the just and lawful right to the ownership of any immovable property in this colony, registered in the name of any other person and cannot procure the enregisterment of such property in his name . . . . by reason of the death, mental incapacity, insolvency, or absence from the Colony of the person in whose name such property stands enregistered . . . . or owing to any other cause, may apply to the Supreme Court by petition to order the registration of the title of such property in his name." The sixth and the three following sections provide for the mode of procedure to be adopted upon such petition. The person presenting the petition and claiming the land is the plaintiff, and the person, if any, who shows cause against the rule as the registered owner of the land is the defendant in the suit. It is impossible, therefore, to hold that by our law prescription merely furnishes a ground of defence and not a cause of action. In the case of *Blackenberg* v. *Colonial Government* (11 J., 93) the Court made a declaration, at the suit of the person claiming a right by prescription as against the Government, that such right had been duly acquired. The Legislature subsequently gave full effect to such declaration by authorising the Governor to complete the plaintiff's right by granting him a quitrent title. In the present case the Court has been asked to make an order compelling the defendants to do everything on their part necessary for the purpose of completing the plaintiff's title. Such an order would make it compulsory on the defendants to obtain the Governor's formal sanction to the transfer. The correspondence, however, shows that the real issue between the parties is whether the plaintiff is to be compensated for the strip of land upon relinquishing it for the benefit of the Council. He proposes to rebuild his premises, but the defendants object to his placing the new building upon any portion of the land in dispute. He admits that the defendants are entitled to define the line of his building, but he claims compensation in respect of the strip of land and structure thereon which he would have to relinquish. The pleadings do not raise the question whether he is entitled to such compensation, but the plaintiff claims title to the land mainly because such title would strengthen his claim to compensation. In my opinion, his claim to compensation would be equally strong if he obtained a declaration of rights as against the the defendants. There is a difficulty in doing more, seeing that the Government have not been joined as defendants in this suit. The Court will declare that the plaintiff is entitled, as against the defendant Council, to exercise full rights of ownership in respect of the strip of land marked B on the plan, subject to the lawful municipal regulations of the said Council. The defendants must pay the costs of the action.

Mr. Justice Buchanan said: I do not think it necessary to add anything to the judgment so ably given by my colleague. In my opinion what has been acquired by the plaintiff in this case is not a mere servitude. If it had been a servitude only there would have been considerable force in Mr. Schreiner's argument. But it is not a mere servitude that has been acquired over the ground, but by adverse possession for thirty years and upwards, the plaintiff has acquired full rights of ownership. Prescription has been made before now the basis of proceedings, as a paragraph in the previous judgment in this Court shows. The paragraph runs: "This Court has frequently decided where land has been acquired by prescription, the registered owner may be compelled to do what is in his power in order to confer on the occupier title in accordance with the laws of the Colony."

Mr. Justice Maasdorp also concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton].

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

DAY v. DAY. { 1896. Feb. 28th.

Mr. McLachlan, for the plaintiff, asked that the rule might be made absolute in this case dissolving the marriage now existing between the parties.

The rule was made absolute.

The Chief Justice said: It is quite clear that this lady, the defendant, is merely seeking for excuses for not returning to her husband. The Court has ordered that if there was tendered to her a second-class ticket to the Cape by one of the steamers she must return. This ticket has been duly tendered, and as the defendant has not obeyed the order of the Court, the rule must be made absolute.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné].

NIEUWOUDT v. SLAVIN AND ANOTHER. { 1896. Feb. 28th. March 2nd.

Lease—Sub-lease—Cession—Assignment—Insolvency—Urban and rural tenements.

Where land has been leased which exceeds in extent what is required for the proper use and full enjoyment of any house on it such land must, for the purposes of the lease, be regarded as a rural tenement.

The insolvency of the lessee puts an end to the lease in terms of the 104th section of the Insolvent Ordinance unless before his insolvency the lessee had made a complete transfer of rights to an assignee, and such transfer would not be deemed complete unless the lessor had accepted the assignee as his tenant in lieu of the lessee.

Swarts v. Landmark (2 J. 5) *distinguished.*

This was an action for ejectment and damages, instituted by Mr. E. H. W. Nieuwoudt against Solomon Slavin and Isaak Jowell.

The declaration alleged:

1. The plaintiff is a farmer residing in the district of Clanwilliam, and is the registered owner of the farm Klein Valley or Kleinvley, situated in the said district.

2. On the 5th of November, 1891, the plaintiff entered into an agreement with one Louis Levi, by which the plaintiff leased to the said Levi a certain portion of the said farm for a period of fifteen years, on the terms and conditions *inter alia* that the said Levi should pay no rent for the first ten years, but should at his own cost and charges build a shop, stable, and wagon-house, of the value of £200, on the said ground, to be kept in good order and repair by the said Levi, and that for the remaining five years of the agreement the said Levi should pay rent to the plaintiff at the rate of £20 per annum, and certain other personal rights were given to the said Levi, and certain other conditions made, as will appear from a copy of the said agreement, with English translation thereof, hereunto annexed, and which the plaintiff prays may be considered as set out in length in this paragraph.

3. The said Levi, in pursuance of the said agreement, took possession of the said land, and on the 12th of September, 1895, the estate of the said Louis Levi was compulsorily sequestrated, and is still under sequestration. The said Levi has failed, and had at the date of the sequestration failed, to perform his part of the said agreement by not erecting the buildings as in the above agreement mentioned.

4. By virtue of the premises the said agreement became null and void, but the defendants have wrongfully and unlawfully trespassed upon and taken possession of the said land, and refuse to quit although requested so to do.

5. The defendants claim to take and retain possession of the said land by virtue of an alleged cession of the said agreement. The said cession, if executed, was executed without the knowledge and consent of the plaintiff, who refuses to acknowledge or accept the said defendants in lieu and in place of the said Levi, and is illegal and of no force or effect.

6. By virtue of the defendants' wrongful and unlawful trespass and refusal to quit possession, and their continued occupation of the said land, the plaintiff has been deprived of the use and occupation thereof, and has suffered damage to the extent of £50, but the defendants refuse to pay any part of the said sum, or to quit possession of the said land.

The plaintiff claims:

(*a*) An order of ejectment from the said land, the portion of the farm Klein Valley, otherwise called Kleinvley, situated in Clanwilliam.

(*b*) An interdict restraining the defendants from again trespassing on the said land.

(*c*) The sum of £50 as and for damages, with interest *a tempore moræ*.

(*d*) Alternate relief, with costs of suit.

The plea was to the following effect:

1. The defendants admit paragraphs 1 and 2 of the declaration, save that for the terms and conditions of the agreement of the 5th Novem-

ber, 1891, they crave leave to refer to the original, copy of which is annexed to the declaration.

2. They admit that Levi, the lessee, took possession of the land in pursuance of the said agreement, and that his estate was on the 12th September, 1895, compulsorily sequestrated as insolvent, and is still under sequestration, but they deny the other allegations in paragraph 3 of the declaration, and say that even if the said Levi had not erected the buildings mentioned in the agreement before his estate was sequestrated, that allegation is wholly irrelevant in this suit, seeing that ten years have not elapsed since the date of the said agreement.

3. On the 5th December, 1894, the defendants lawfully entered with the said Levi into the contract, copy whereof is hereunto annexed and marked "B," whereby for the purposes and in accordance with the terms and conditions thereof, the said Levi sub-let and the defendants hired from him the land hired by him from the plaintiff under the agreement of the 5th November, 1891.

4. Thereafter, on the 13th May, 1895, the said Levi and one Gert Johannes Smit entered into the agreement, copy whereof is hereunto annexed and marked "C," whereby in accordance with the terms and conditions thereof the said Levy ceded and assigned to the said Smit all his right, title and interest in the two agreements aforesaid, of the 5th November, 1891, between himself and the plaintiff, and of the 5th December, 1894, between himself and the defendants.

5. The plaintiff knew and approved of the agreements entered into as set forth in the two last preceding paragraphs of this plea, and the defendants duly took and still claim to hold lawful possession of the land leased under and by virtue of their agreement with the said Levi, and the subsequent agreement of the said Levi with the said Smit, from whom they now hold as sub-lessees.

6. They admit that they refuse to quit possession of the said land or to pay any part of the sum demanded by the plaintiff, but, save as aforesaid, they deny all other allegations in paragraphs 4, 5, and 6 of the declaration.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

Issue was joined on the replication.

Mr. Juta, Q.C., and Mr. Graham appeared for the plaintiff.

Mr. Schreiner, Q.C., and Mr. Benjamin for the defendants.

Ernest Hendrik Wolfaardt Nieuwoudt, farmer, of Clanwilliam, said that on the 5th November, 1891, he entered into an agreement of lease with one Levi. Levi then entered into possession, and afterwards desired the contract to be altered. Levi threatened that if he did not make an alteration in the contract he would leave at once and claim £160 against witness. Witness heard of a contract between Levi and defendants on December 5, 1894, and communicated with his agent at once, and a letter was sent to Levi informing him that he would be held to the terms of his contract. He had never consented to the sub-lease by Levi to the defendants. He let between 200 and 300 morgen of land to Levi, some of which was arable land. He first heard of Smit about October 5, 1895. He remembered Hanekom being on his farm about May 11. On October 5, 1895, he received a letter enclosing a copy of a sub-lease and cession by Levi to Smit, and purporting to remind him of a message sent by Hanekom that he would rather have Smit than Levi as a tenant. He had never given Hanekom any such message. After receiving the letter he at once wrote to his attorney, Pocock, and went to see him as soon as he returned from Cape Town. He did not agree to Smit taking over the place. He had not seen the agreement between Levi and Smit before October 5, 1895. He did not know that in the contract Levi relieved Smit of the necessity to erect buildings. Levi had erected a shop, but had not put up a stable or wagon-house on the ground leased. He had put up a wagon-house on the opposite side of the road to the ground that had been leased. He had not allowed Levi to erect buildings on the lower side of the road. Levi was now on the Breakwater, he believed, for culpable and fraudulent insolvency. He had given notice to defendants that he desired possession, never having recognised them. He had sold the land in question by public auction. Smit was present at the sale and raised no objection. He had sustained damage through being prevented from using the land, and estimated his loss at £60. The value of the shop was about £60. One of the walls had fallen down twice, and there was now a crack in the wall. The building on the other side of the road was worth £20 or £25. In 1894 he put up a board warning Levi not to go on the upper side of the road.

Cross-examined: He did not institute the present action because he could not give transfer of the land until he got rid of the lease. The reason why he wanted to get rid of the defendants was because he did not recognise them as his lessees. He had heard a rumour before October 5, 1895, that Smit had something to do with the lease. He had not told Hanekom that Smit would be better to deal with than Levi. Levi had won

two cases in the Resident Magistrate's Court against witness. He and Smit were fairly good neighbours. He had seen Van der Merwe and Lubbe at Van Zyl's farm some time about August, 1895, shortly before the insolvency of Levi. He had not said then that he preferred Smit to Levi as a tenant. What he had said then was that he had not seen a lease of Levi to Smit. He had not said that Smit must build according to the original contract. He had been to the property in question when the defendants were in possession, in fact he had dealings at the shop, but he had never said he was pleased that the defendants had taken Levi's place. The building on the lower side of the road was built against his protest, but Levi said he was "baas." About three muids of seed could be sown on arable land let to Levi—it never had been cultivated, however. The shop in question was conveniently situated on the Piquetberg-Clanwilliam road. He had not agreed to the wagon-house being thatched instead of being roofed with iron. If Levi said it cost £250 to put up all the buildings, he would deny it—they did not cost more than £90 to build.

Re-examined: By the contract between Levi and Smit, the latter had not to erect any buildings. Levi had wanted him to make a contract giving him the right to build the wagon-house on the lower side of the road, but he would not consent.

By the Court: He had sold the whole farm for £1,932, and he valued the part leased at about a third of the whole. The lease commenced in 1891 and from that time he had received no rent. He would not let the land without the buildings for less than £30 per year, but he had granted the lease to Levi especially cheap in consideration of the erection of the buildings.

Maria Margaretha Jacoba Nieuwoudt, the wife of the plaintiff, remembered Hanekom coming to their house last May. He brought a message that Smit had taken over the lease from Levi. Her husband said he would object, and immediately wrote a letter to his attorney Pocock.

Cross-examined: She had not heard her husband say he preferred Smit to Levi as a tenant.

Louis Henry Pocock, agent and auctioneer, Clanwilliam, said he had acted for the plaintiff for some years. He had never agreed on behalf of the plaintiff to the cession of the lease, but had always strenuously objected. In November, 1894, he wrote to Levi requiring him to keep to the lease in its entirety. He saw Levi, who said he was just putting the defendants, his servants, into the shop while he went trading to Namaqualand. He had not seen the cession from Levi to Smit until after the insolvency of Levi in September last. He then told Smit, Levi, and Jowell that he should hold them as trespassers if they did not leave immediately. The shop as it stood was worth at the outside £75. At the auction £170 was offered for the land with the shop. The value of the wagon-house was not more than £25 or £30.

For the defence,

Louis Levi said he had entered into the contract with the plaintiff for the purpose of setting up a shop. There was no shop there before. He was on good terms with the plaintiff until 1894. He put the wagon-house on the lower side of the road, but the plaintiff made no objection until eighteen months after the buildings had been erected. Before they became bad friends plaintiff had made no objection—in fact, he lent him the straw to thatch the wagon-house. The building had cost £250. He had plenty of water on the land, and could cultivate ground sufficient for six or seven muids of seed. He considered himself a farmer, shopkeeper, or anything. He had had seven muids of rye sown on the land. It was not all sown in one patch, but in several. Slavin and Jowell came in November, 1894. They had previously been traders in Namaqualand. He entered into a contract with them at that time, and informed the plaintiff. He stayed a little after that, then took his stock-in-trade away, and received £60 for the fittings. In December he left, and up to the time of his leaving he saw the plaintiff frequently on the premises. After riding "togt" he returned in May, and entered into a contract with Smit, whereby the latter paid him £80 for all his rights under the lease. Hanekom and Smit had had a conversation a few days before the contract was signed, but he took no part in it.

Cross-examined: He had had a great number of sheep on the farm. He had never spoken to Pocock at any time about these affairs. Once they had met, each in his own cart, but neither got down from their carts, and they drove away without speaking. He had spent £250 on the buildings, and had kept a proper and full account of the moneys, at least all that had reference to his business. When Hanekom was present, four days before the agreement between him and Smith was signed, the agreement had been verbally concluded. He had had nothing to do with the defendants' business.

Solomon Slavin, one of the defendants, said they had entered into an agreement with Levi. Previously they had been traders in Namaqua-

land, though there had been no business connection between him and Joel, or either and Levi until the time of Levi's agreement. They met as they were returning to Namaqualand, and entered into a partnership to take over Levi's business. Nieuwoudt came to the shop on the day they took possession. He congratulated them, and hoped they would do well. He said he could never agree with Levi, and he hoped to be able to get on better with them. Plaintiff had done business with them regularly. Smit had told them about his contract about the time it was made, and they told plaintiff, who said he was very glad. They had re-thatched the wagon-house. The shop, wagon-house, and stable he valued at £150 at the least—perhaps £170. Only a few mules and a couple of horses had been kept on the land by them. Levi had only a few slaughter stock on the ground when they came there. They had not cultivated the ground beyond making a small kitchen garden.

Cross-examined: The value of the ground was about £150, and the shop on it about £100 or £150 in addition. He did not remember a letter from Mr. Pocock holding Levi responsible. He knew that Smit took over all the rights of Levi, and when the contract was made, the plaintiff had said he was glad, because now he would be quite safe about his building.

Re-examined: When he valued the whole of the land and buildings the firm occupied at about £300, he included the wagon-house.

Isaac Jowell, also one of the defendants, and partner of the last witness, said they took possession of the property from Levi on December 6, 1895. The plaintiff was present at the shop on the day they took possession. He congratulated them, and wished them well. They put in their own stock, and had done good business since opening. Levi had never any interest in their business. The shop was 32 feet long, 17 feet high, and 26 feet broad; the wagon-house was 42 feet long, 9 feet high, and 36 feet broad.

Gert Johannes Smit, farmer, Boskloof, said he was a neighbour of the plaintiff. In 1895 Levi offered to sell him his rights over the property in question. He was afraid plaintiff would not be satisfied, but eventually an agreement was made on May 13, when he paid 375 rolls of tobacco (valued at £55 10s.) and £24 10s. in gold to Levi for his rights under the lease. Hanekom heard the negotiations, and went to the plaintiff, and returned bringing a message that he and Smit would get on better than plaintiff and Levi. The defendants had recognised him, and paid him the rent of the building—£25 a-year. The plaintiff had never asked him to do anything under the lease which he had refused to do. He was ready to roof the wagon-house with iron if the plaintiff asked him. On October 5 a letter had been written on his behalf to the plaintiff offering to abide by the contract. The buildings on the ground in dispute were worth about £150.

Cross-examined: He had got notice in writing from Mr. Pocock ordering him to surrender the premises—at least he thought so. He believed that was before October 5, and before the insolvency of Levi, for Levi had said he would make it all right with plaintiff. By the terms of the cession with Levi he was not to build other buildings on the ground.

John B. Kayser, attorney of the Supreme Court and clerk for Messrs. Van Zyl & Buissinné, said that his firm were consulted by Mr. Fryer on behalf of Smit in that matter on September 1, 1895.

Abraham van der Merwe, farmer, Driefontein, living twenty minutes from plaintiff's farm said a conversation had taken place in August, 1895, some time after the 25th, when plaintiff mentioned that Smit had taken over Levi's contract, and he was glad thereat. Plaintiff said that Smit had to keep all the buildings in proper order. Plaintiff had first spoken about the matter.

Cross-examined: Plaintiff had told him that Smit had to build new buildings, and he had an argument with him, as Smit had told him he had not to build new buildings. His family and plaintiff's family had had quarrels, but he was not bad friends with plaintiff.

Willem Jacobus Lubbe, farmer, Groot Vlei, said he was a neighbour of the plaintiff, and on good terms with him. Plaintiff had told him he was satisfied with the defendants, as they were better than Levi. Afterwards when Smit took over Levi's lease the plaintiff said he was satisfied with Smit, who was an Afrikander, and he should get his house built now. Van der Merwe was present, and said Smit need not build at present, but plaintiff said he must build at once.

Jurie Hanekom said he knew the various parties in the action. In May last he was at Smit's farm, when something was said between Smit and Levi. He went from there to plaintiff, having told Smit that he would see plaintiff. He told plaintiff that Smit was afraid of taking a cession from Levi, but plaintiff told him that Smit might take it, as he would agree with him better than he could with Levi.

Cross-examined: He did not know the terms of the contract between Smit and Levi. He did not know that it was concluded when he left.

By the Court: It was on May 9 that he went on that message to the plaintiff.

This closed the defendant's case.

Mr. Juta was not called upon.

Mr. Schreiner, Q.C., argued as follows: The issue of fact is, did Hanekom convey to Smit an express assent by the lessor to take over Smit as lessee in place of Levi; for mere tacit knowledge would be immaterial. Hanekom decidedly says Nieuwoudt was glad to get Smit, a friend and neighbour, in place of a stranger with whom as a fact he was on bad terms. This fact may be taken as proved. The main difficulty is: Was the arrangement, such as it is, a complete placing of Smit in place of Levi? The whole case turns on section 104 of Ordinance 6 of 1843. If the insolvency of Levi had not supervened the case would have been simpler, for when Levi assigned the lease he had to be able to assign. Granting there was not £200 worth of buildings erected at the date of assignment: by Nieuwoudt's assent he took Smit in place of Levi and he was not affected by any agreement as between them to put up buildings &c., and hence the insolvency of Levi becomes wholly irrelevant. The test is, has Levi or his trustee taken any advantage under the proviso to section 104? So that really the whole question comes back to the evidence of Hanekom, which clearly shows that on 9th May he did convey Nieuwoudt's assent to Smit taking over the lease.

Chief Justice: The original lease was in writing: should there not have been a writing or at least cession by endorsement to effect delegation? (See *Reid's Trustee* v. *Reid* 5 E.D.C., 23.)

Mr. Schreiner; A sub-lease in no way effects a privity between lessor and sub-lessee. Our case rests on Hanekom's evidence. But even as to section 104, it is always interpreted strictly, not liberally.

Chief Justice: Have you considered *Van der Keessel's Thesis* 674, which lays down that assignments of rural tenements must be in writing?

Mr. Schreiner: Yes, but compare our law as in *De Vries* v. *Alexander* (Foord, p. 43), *Parkin* v. *Lippert* (5 Sheil, 211); *Swartz* v. *Landmark* (2 Juta, 5); *Green* v. *Griffiths* (4 J., 346). Sande, though a laborious commentator, does not include such a provision. It would be an advance on anything hitherto held in our law. *Green* v. *Griffiths* would have been strongly affected if sub-leases were required to be in writing. We have no decision exactly in point, and by implication from the custom of the country the provision of the old *Placaat* is obsolete on this point.

The Chief Justice: The plaintiff, as the owner of the farm Kleinvlei, seeks to eject the defendants and claims £50 as damages for trespass. The defence is that the defendants are entitled to occupy a portion of the farm under sub-lease from Levi, the lessee, and that although Levi has become insolvent the lease is still in force because all his rights thereunder had, before his insolvency, been ceded to one Smit. Three questions arise in this case, viz.: Firstly, was the land let by the plaintiff a rural or an urban tenement? Secondly, if it was a rural tenement was the lessor's consent duly given to the sub-lease; and thirdly, if such consent was duly given, was the cession to Smit completed before the lessee's insolvency so as to prevent the operation of the 104th section of the Insolvent Ordinance? As to the first question, I am clearly of opinion that the land leased must be regarded as *praedium rusticum*. I adhere to the view expressed in *Swartz* v. *Landmark* (2 J., 5) that the test whether a tenement is rural or urban is not the place where the property is situated but the use to which it is devoted. In that case a small plot of land had been leased for the purpose of erecting a building for a shop, and the fact that under the lease the lessee had rights of grazing on the remainder of the lessor's farm was held not to make the tenement a rural one. *Prima facie*, land, to the extent to which it is not actually built upon, is *praedium rusticum*, but if such land is a mere messuage adjoining a house and required for the proper use and full enjoyment of the house it is regarded in law as *praedium urbanum*. It follows that where land has been leased which exceeds in extent what is required for the proper use and full enjoyment of any house on it, such land must for the purposes of the lease be regarded as a rural tenement. The buildings may of course be leased separately from the remainder of the land, and in that case the buildings would be urban and the lands rural tenements, but when the land and buildings are included in one and the same lease the only test as to the nature of the tenancy is whether or not the remainder of the land was required for the proper use and full enjoyment of the buildings. In the present case upwards of two hundred morgen of land were let to Levi for fifteen years, on condition, *inter alia*, that he should pay no rent for the first ten years, but should at his own cost build a shop, stable, and wagon-house thereon of the value of not less than £200, and that for the remaining five years he should pay rent at the rate of £20 a year. The land is well irrigated, and according to Levi's own evidence,

he sowed seven muids of rye on it in one season. It is impossible to hold that the land was required for the proper use of the buildings to be erected. The lessee intended to carry on farming as well as trading on the land leased, and as the whole property was included in one and the same lease the tenement must be regarded as rural. The lessee could not therefore, without the consent of the lessor, sub-let the land or cede his rights under the lease to a third person. The next question is whether such consent was ever given by the plaintiff. The Placaat quoted in *De Vries* v. *Alexander* (Foord, p. 46) required that such consent should be in writing, and I am not aware of any decision which has recognised a different rule in this colony. But the evidence in this case does not satisfy me that the plaintiff was aware of the sub-lease to the defendants or of the alleged cession to Smit. He certainly did nothing from which a consent to the sub-lease could be inferred. As to the cession to Smit the plaintiff denies having sent any message on the subject to Smit, and the statement of the witness Hanekom to the contrary is due, in my opinion, to a misunderstanding. After Levi's insolvency, Smit wrote to the plaintiff undertaking liability to all the conditions imposed by the contract of lease on Levi, the lessee, but the plaintiff then refused to consent to the cession. But, in the third place, even if the plaintiff had consented to the sub-lease by Levi, it does not follow that he became bound, upon the insolvency of Levi, to accept the defendants as tenants. The effect of a sub-lease is to create a new contract of letting and hiring between the lessee and sub-lessee, but not to transfer to the sub-lessee all the lessee's rights under the lease. The lessee still remains, in the words of the 104th section of the Insolvent Ordinance "entitled to the lease or agreement for lease," and upon his insolvency the lease or agreement for lease "ceases and determines." It would have been different if there had been a complete assignment of the lease before Levi's insolvency for, as stated in *Green* v. *Griffiths* (4 J., 346), the effect of such assignment would have been to transfer all Levi's rights and obligations under the lease from him to Smit. On every ground, therefore, I am of opinion that the defendants are not entitled to the rights of occupation claimed by them. Allowing for the improvements made on the property the damages sustained by the plaintiffs do not amount to more than £5. Judgment will therefore be given for the plaintiff in terms of prayers (*a*) and (*b*) of the declaration, and for £5 as damages with costs.

Mr. Justice Buchanan concurred. He said: It should be clearly understood that by this case it is not now decided that a written cession of a lease is necessary. It is very desirable that in all these matters there should be written evidence however.

Mr. Justice Maasdorp also concurred.

Plaintiff's witness expenses were allowed.

[Plaintiff's Attorney, G. M. Walker; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

WILEY AND CO. V. LOUBSER.

Mr. Buchanan applied for a provisional sentence on a promissory note for £60 7s. 5d.

Provisional sentence granted as prayed with costs.

VOLLMER AND CO. V. H. A. ROSSOUW.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £550, less £171 1s. paid on account, with interest at the rate of 8 per cent. per annum from September 15, 1894.

Provisional sentence was granted.

DU PREEZ V. NEETHLING.

Mr. Close applied for a writ of civil imprisonment against the defendant for non-payment of costs on a judgment given during the November term. The amount of the costs was £128 8s. 9d.

Application granted.

ILLIQUID ROLL.

DE VILLIERS V. J. M. FICK.

Mr. Evans applied for judgment, under Rule 329, for £5 5s., professional services rendered.

Granted.

SMITH V. A. J. VAN DER MERWE.

Mr. Sheil applied for judgment, under Rule 329, for £55 13s. 4d., less £40 paid since issue of summons, with interest and costs.

Granted.

ADMISSION.—*Ex parte* LUDOLPH.

On the application of Mr. Graham, Mr. Louis Ludolph was admitted as a conveyancer.

REHABILITATIONS.

On the application of Mr. Sheil, the rehabilitation of Carel Frederick Stumke was granted, and a similar application by Mr. Evans, on behalf of William Jacobus Smit, was granted.

Mr. McGregor applied for the rehabilitation of George da Costa Ricci.

Order granted.

Mr. Maskew applied for the rehabilitation of George Quin, of Worcester.

Order granted.

Mr. McGregor applied for the rehabilitation of Samuel Lazarus, of Cape Town.

Application refused, with leave to apply again in six months.

GENERAL MOTIONS.

THE PETITION OF ALFRED S. LAKE.

Mr. Jones applied for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion; also for the custody of the minor children of their marriage.

Leave was granted, the order to be returnable on May 14; personal service to be effected.

INCORPORATED LAW SOCIETY v. MCCOLLA. { 1896. Feb. 29th.

Attorney — Professional misconduct — Removal from roll.

Where an attorney of the Supreme Court had collected moneys for a client and having failed to account for them had secretly left the country,

The Court *ordered his name to be struck off the roll and directed that the facts should be communicated to the Law Society in England of which respondent was a member.*

This was an application on the return day of a rule *nisi* issued by the Court on the 12th December calling on the respondent to show cause why he should not be suspended from practice as an attorney of this Court or otherwise be struck off the rolls altogether for professional misconduct.

In the action Scott v. McColla the declaration alleged that the respondent had collected moneys for the plaintiff which he had failed to pay over, or to account for in any way. Judgment went by default. Respondent secretly left the country and a return of *nulla bona* was made to the judgment writ.

Mr. Searle, Q.C., for the Law Society, stated that a solicitor of the Supreme Court of Judicature in England who had the same name was suspended there for two years for having acted as commissioner of oaths of that Court when he was not so appointed.

The Chief Justice said: This gentleman has disappeared altogether from the country, and this is not his first offence apparently. I think we ought to strike him off the roll entirely, and the Registrar will communicate with the Law Society in England informing them that the respondent has been struck off

[Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

GILLET V. KIESER.—GILLET V. NOWITZ.

Mr. Innes, Q.C., applied for removal of the suits between the parties from this Court to the approaching Circuit Court for Beaufort West, by reason that the parties and witnesses can more conveniently attend there than at Cape Town.

Mr. Graham having consented, the order was granted.

MURPHY V. MURPHY.

Mr. Close applied, on behalf of the plaintiff, for further directions as to the service of the process in the suit instituted by him against his wife for divorce by reason of her alleged adultery, as she cannot be found after careful search in Johannesburg.

The Chief Justice said: In the absence of personal service you may take leave to serve the summons on Jane Watkins, the sister of the defendant, the notice to be published once in the Johannesburg "Star" as well as in the "Government Gazette." Returnable May 14

THE PETITION OF JACOBUS N. DE JONGH.

Barrister — Attorney — Voluntary removal from roll—Affidavit.

The Court *ordered applicant's name to be removed from the roll of attorneys to enable him to enter at the Inner Temple to qualify as a barrister.*

Affidavits sworn in the Transvaal must be made either before a Commissioner of the Supreme Court or before a Justice of the Peace with the counter-signature of the State Attorney.

Mr. Maskew applied for an order removing petitioner's name from the roll of attorneys, notaries, conveyancers, and translators in this colony, on the ground that he is about to enter at the Inner Temple to qualify himself to practise as a barrister-at-law, and that the rules of the Inner Temple require his name to be removed from such rolls before admission.

The Chief Justice said the Court will make an order subject to another affidavit to the effect that there is no complaint pending against him as an attorney or notary public, which affidavit may be submitted to the Registrar. I may point out that this affidavit is sworn before a Justice of the Peace without the counter signature of the State Secretary. It has always been the custom to have the counter signature, unless the affidavit has been made before a Commissioner of this Court. The Court has appointed several Commissioners in the Transvaal, and the next affidavit must be in due order.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

THE PETITION OF JAN J. BESTER

Mr. Jones applied for authority to raise a sum of money on mortgage of certain property, known as Lot C of the farm Grootfontein, in the district of Riversdale, for the purpose of paying the costs of partition and constructing a dam, whereby the capabilities of the farm will be increased.

No order was made.

IN THE MATTER OF NICOLAAS L. BESTER, A LUNATIC.

Mr. Watermeyer applied for authority for the curator of the said lunatic to raise a sum of money on mortgage of his landed property situated in the district of Riversdale, for the purpose of paying the costs of partition and also satisfying certain debt due to the curator.

The Chief Justice said: The Court will grant leave to mortgage the land for the sum of £115, instead of £'35, on the petitioner undertaking to pay the annual interest so long as he has occupation of the farm. As to the £20, I do not think that he is entitled to have it included in the bond.

IN THE ESTATE OF THE LATE JOHANNES H. VAN DER MERWE.

Mr. Molteno applied for authority to the executors testamentary to raise a sum of money on mortgage of certain farms, the property of the estate, situated in the district of Richmond, to enable them to satisfy the liabilities of the said late Van der Merwe.

The Chief Justice said: The Court will authorise the mortgage for the sum of £2,050, which ought to be amply sufficient: and as to the further condition mentioned, that cannot be inserted.

IN THE MATTER OF THE MINOR JAN H. VILJOEN.

Mr. Innes, Q.C., applied for the sanction of the Court to the acceptance by the said minor of certain conditions in the wills of his grandparents by which the funds are provided for his education for the medical profession, subject to repayment thereof on coming into possession of certain landed property bequeathed to him and his sister jointly.

The Chief Justice said: The Court will make the order subject to the production to the Registrar of an affidavit from the minor that he wishes to proceed to Europe for the purpose of studying for the medical profession.

In re ESTATE C. F. DURING. } 1896. Feb. 29th.

Mutual will—Purchase by heirs—Absent major heir—Consent of minor heirs—Interest of executor dative.

Where a mutual will provided that any heir might take over the landed property and pay out the other heirs the Master refused to allow such a purchase by A., *one of the heirs, to go through without an order of Court, on the ground that the whereabouts of one of the majors was unknown and that the consent on behalf of the minors was given by the executor dative, who happened to be the husband of* A.

Carl Frederick During and his wife executed a mutual will in terms of which it was competent for any of the heirs to take possession of the landed property in the estate and to pay the other heirs their portion of the inheritance. Carl During survived his wife.

One of the heirs, Wilhelmina During, married in community of property to Charles Verner, the executor dative in the estate of Carl During, purchased the property for £208. All the *major* heirs consented except one, William During whose whereabouts were unknown. The executor dative was also the tutor dative and he gave consent on behalf of the minors,

A declaration before a Justice of the Peace was made by a Mr. Shaw to the effect that William During's whereabouts were unknown. Mr. Shaw had as agent for the executor dative paid £13 to William During in full settlement of all claims on the estate.

The Registrar of Deeds declined to allow transfer on the purchase by Wilhelmina During, holding that Mr. Shaw's declaration was insufficient and questioning the right of Mr. Verner to consent as tutor on behalf of the minors.

The Chief Justice said: I think that the Registrar of Deeds was right in insisting that the consent of the heirs should be obtained, seeing that the executor is mainly interested. The matter has apparently been before the Master, who had no objection to the sale. It is not necessary now to cause any further expense in the matter; further, all the major heirs consent to the sale, and I think we may take it that it is a fair price. That is the principal issue in the case: Is it a fair price? We believe it is, and the order will be granted.

[Applicant's Attorney, G. Trollip.]

PEACH AND CO. v. SIMON'S TRUSTEE. } 1896. Feb. 29th.

Insolvency—Preference—Griqualand West Deeds Registry—Domicile—Act 39 of 1877, section 29.

S. *while domiciled in Griqualand West passed a bond in favour of* P. *which was duly registered in the Griqualand West Deeds Registry Office.*

Thereafter S. *became domiciled in the colony proper, where his estate was sequestrated as insolvent*

Held that, *in view of the provisions of section* 29 *of Act* 39 *of* 1877 *the preference under the bond extended only to the assets within Griqualand West and that the Master could not consistently with the rights acquired by creditors under a sequestration in the Colony proper award any preference in respect of the assets outside Griqualand West.*

This matter was before the Court on the 3rd February last,* when it was declared that the bond attempted to be proved by the applicants was good, and the Court ordered that the proof should be admitted by the Master.

The matter was submitted to the Master to decide the question of preference, with leave to either party to apply to the Court.

The Master held that the bond could only rank as a concurrent claim, the following being his reasons: In this matter the Court has decided that the general bond registered in Kimberley remains in force, and that the debt due thereunder should be admitted by the Master as a claim again t the estate. The Court has now referred the matter to the Master to decide the amount of the claim, for which preference shall be awarded. It is admitted that there are no assets in Griqualand West, where the bond was passed and is registered. It has also been admitted that the bond has not been registered in this colony, it cannot, therefore, claim a preference over assets in this colony, but can only rank as a concurrent claim The Master is, therefore, of opinion that there is a concurrent claim against the estate of £80 8s. 1d. with interest.

The applicants now appealed from this decision.

Mr. Searle, Q.C., for the applicants: We do not admit that the bond is not registered in this colony, although we do admit that it is not registered in the Deeds Office in Cape Town. If the bond had been registered in the Deeds Office, Cape Town, it would have been of no greater validity.

The Act specially says that no such bond shall gain any additional force by being so registered, but that does not mean that it shall have no force at all if the debtor leaves Griqualand West; yet that will be the effect of the Master's decision.

In the present case the insolvent left Griqualand West in 1894 and came to live in Cape Town, and shortly afterwards surrendered.

If the Master's decision is correct the Kimberley bond creditors lose their remedy. In other words Griqualand West is a protected district and a harbour of refuge for dishonest debtors.

Kaffraria is in the same position, for the same provisions appear in Act 3 of 1865 as in the Griqualand West Act of 1877.

It is submitted that the intention was exactly the same as in the Bechuanaland Act of 1895.

In the case of mortgage bonds of immovable property the effect of this decision will be to enable any debtor on a bond passed in Kaffraria or Griqualand West to defeat the general clause by leaving those districts.

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* See page 18 *supra* for the report of the previous application of February 3. For convenience of reference the judgment on the application of February 29 is also there printed; counsel's application as there reported for costs to be granted out of the estate referring however of course to the costs of the application of February 3. REP.

It is not as though the creditor can follow his debtor and register in his new abode; he is expressly prevented from so doing.

The object of the Act was to preserve the special privilege of registration, which was to be a registration for the whole colony.

The laws of the Colony apply to Griqualand West and Kaffraria.

These are integral portions of the Colony. Registration in such a Deeds Office is notice to every one. The creditors in Cape Town are therefore fixed with notice.

Again, the maxim *Mobilia non habent sequelam* applies.

Notice of a bond in Cape Town is notice throughout the Colony, and *vice versa* in the case of bonds registered in Griqualand West or in Kaffraria.

Mr. Benjamin for the respondent was not called on.

The Court dismissed the appeal.

The Chief Justice: The applicants' bond having been admitted to proof in accordance with the decision of this Court on the 3rd instant, the Master was called upon to decide to what extent preference should be awarded thereon, and he has decided that only assets in Griqualand West, where the bond was registered, should be subject to such preference. The registration took place while the debtor was domiciled in Griqualand West, but he subsequently became domiciled in the colony proper, where his estate was sequestrated as insolvent. The creditors have appealed to the Court against the Master's decision. The 29th section of the Griqualand West Annexation Act, No. 39 of 1877, enacts that "the Deeds Registry of the said Province shall, in regard to that part of the Colony formed by such annexation, remain and be of the same force and effect after such annexation as before such annexation." Before annexation the registration in the Province of a general bond could have no effect on the assets situate elsewhere of a debtor who has become domiciled and then insolvent in another country. The assignment by operation of the Insolvency Law of his domicile at the date of insolvency would operate as an assignment of his movable property wherever situate, and it is only by virtue of the hypothecary rights acquired within the Province that the bond creditor could prevent the full operation of such assignment. In *Howse's* case (3 J., 14), the right of a creditor with hypothecary rights to make those rights effectual by an action in the courts of the country where they had been acquired was fully recognised. But neither in that case nor in the cases there cited was it suggested that assets situate in the country where the debtor's estate had been sequestrated could be subjected to the hypothec. The rules of law of that country for the distribution of the insolvent's assets would regulate the distribution of all assets found there. The fact that the Province has been annexed to the Colony does not confer on the applicants greater rights than they would have possessed without such annexation, and the 29th section of the Act expressly provides that the Deeds Registry shall remain of the same force and effect after as before annexation. The Master by awarding preference in respect of assets within Griqualand West gave full force and effect to the registration of the bond, but he could not, consistently with the rights acquired by creditors under a sequestration in the colony proper, award preference in respect of assets outside Griqualand West. The appeal must therefore be dismissed with costs.

Their lordships concurred.

[Applicants' Attorney, Gus. Trollip: Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

RYKLIEF V. RYKLIEF'S EXECUTRIX. { 1896. March 2nd.

Will—*Fidei-Commissum*—Perpetuity—Presumption.

Testators by their mutual will bequeathed certain land to their children on the death of the surviving testator on condition that the children should never be allowed to alienate the land, "it being the testator's desire that the said land shall have to be and remain a patrimony (erfgoed) *for their children and further descendants under the same limitations as those under which their children shall assume the same."*

Held, *that a* fidei-commissum *was intended to be created, but that, in the absence of a manifest intention to the contrary expressed in the will, such* fidei-commissum *should be confined to four generations counting from the first fidei-commissary legatees, viz., the testator's grandchildren.*

This was a special case stated for the determination of the Court in the following terms:

1. The plaintiffs are grandchildren of Philip Ryklief, formerly of Wynberg, in the Cape Division and of his spouse, Sophia Ryklief, to whom he was married in community of property.

2. The defendants are the executors dative in the estate of the late Philip Ryklief, and took out letters of administration on the 24th day of December, 1895.

3. In or about April 4, 1840, the said Philip and Sophia Ryklief made a mutual will, a translation of which is hereunto annexed marked "A."

4. Philip Ryklief died at Wynberg in or about the 13th May, 1868, leaving his wife Sophia surviving. She adiated under the said will, received the benefits thereof, remained in possession of the whole estate, and died at Wynberg in or about the 9th November, 1877.

5. At Philip Ryklief's death there were three children of the marriage surviving, namely, one daughter and two sons, all of whom have since died. The plaintiffs are the children of the said sons and daughter, and are all majors.

6. Under the said will the testators bequeathed certain immovable property situate at Wynberg, and described in the said will, to all their children jointly, to be taken possession of at the death of the survivor under the following conditions: (1) That their collective children shall be entitled to live on the said piece of land with the buildings now existing or the buildings hereafter to be erected thereon, and to cultivate the same either for their joint account or each for himself, according as they shall agree; (2) that they shall never be allowed to sell or encumber either the land or the buildings, it being the testators' desire that the said pieces of land with the buildings existing or hereafter to be erected thereon shall have to be and remain a patrimony for their children and further descendants under the same limitations as those under which their children shall assume the same at the death of the surviving testator, and the survivor of them shall leave it.

7. The plaintiffs have children, some of whom are minors.

8. The said immovable property is situated near the Wynberg Railway-station, its area being about two morgen, more or less, and the Divisional Council valuation is £975 sterling.

The property has been apportioned amongst the plaintiffs by agreement.

The plaintiffs contend that the reservation imposed upon the sale of the said property restricted only the children of the testators, and that they themselves are now at liberty to dispose of the property, and divide the proceeds free of any *fidei-commissum* or burden whatsoever.

The defendants contend that the said property is restricted in the hands of the plaintiffs, a *fidei commissum* being under the will imposed upon them by the clause in the will above referred to in favour of the great-grandchildren and other descendants of the testators.

Wherefore each party prays for judgment according to their contentions, and that the costs may come out of the estate.

Mr. Searle, Q C., for the plaintiffs.

Mr. Molteno for the defendants.

The following is the text of the important clauses in the will:

And the testators declared to pre-legate to their children collectively born of their union, or yet to be born of that union, certain piece of property with a piece of perpetual quitrent ground annexed, together with another certain piece of landed property now owned by the testators, to be assumed by their collective children after the death of the surviving testator, under the following conditions and stipulations:

1st. That their collective children shall be entitled to live on the said piece of land with the buildings now existing or the buildings hereafter to be erected thereon, and to cultivate the same either for their joint account or each for himself, according as they shall agree.

2nd. That they shall never be allowed to sell or to encumber either the land or the buildings, it being the testators' desire that the said pieces of land with the buildings existing or hereafter to be erected thereon, shall be a patrimony for their children and further descendants under the same conditions as those under which their children shall assume the same at the death of the surviving testator, and the survivor of them shall leave it.

Further, the testators declare to nominate and appoint one the other reciprocally, that is the first dying the survivor, together with their children born thus far, or hereafter to be born of their union, or in case of predecease their legal descendants, to be his or her universal heirs of anything the testators may relinquish and leave on their demise, nothing excepted.

(The translation of the will as annexed to the special case contained the words "an heirloom" as the translation for "*Erfgoed*" (patrimony): also the words "for ever," for which there was no warrant in the original will. By consent the necessary amendments were made.)

Mr. Searle for the plaintiffs argued that in the will the children are appointed heirs, under a *fidei-commissum*, which rests on them alone to prevent them selling. Nothing is said about

the others not selling except that the will does provide that the grandchildren shall inherit "under the same conditions" as the children; but the testator does not make them his heirs or impose any obligation directly on them not to sell.

Any prohibition of alienation where the person in whose favour it is made is not mentioned is by Roman-Dutch law void; there is no real, but only a personal prohibition—even where there is the clause "*ne extra familiam alienatur.*" In any case if there is no clear *fidei-commissum* the Court will construe liberally *pro herede* and not in favour of burthening the property. See *Lind* v. *Calitz* (2 Sheil, 201) and *Nel* v. *Nel's Executrix* (1 Sheil, 125).

Chief Justice: That case would be a strong one to show that there is no *fidei-commissum* beyond the grandchildren.

Mr. Searle: In *Nel's case* the grandchildren were clearly prohibited—but here the children only are prohibited from alienating. Therefore they are in the same position as the grandchildren in *Nel's case*, in each case the difficulty being as to the rights of the descendants of the specified degree.

The piece of ground here in question is small, and relief is sought against a perpetual tying up of the property. There are already eighteen heirs entitled to it.

Mr. Molteno for the defendants contended that though this fractional sub-dividing of interests in the property might be a hardship, yet the Court must uphold the testator's intention. This intention is clear—a stronger expression of intention as to who should get the fidei-commissary interest could not be desired. The words in the second paragraph "further descendants" in conjunction with "never" is clearly a strict tying up, and the grandchildren are to take "under the same conditions" as the children.

The Roman-Dutch law is that where there is a mere general prohibition it goes only to the fourth degree, and it will go beyond that only if the testator clearly wishes it. See *Sande*, "Restraints on Alienation" (pages 171, 180 and 222 of Mr. Webber's translation); *Van Leeuwen* (3, 8, 7); *Schorer* (note 144 on Grotius, "Introduction to Dutch Jurisprudence").

The Chief Justice said: The will has not been very correctly translated. The conditions on which the land in question was bequeathed to the testators' children on the death of the survivor are as follows: (1) That their collective children shall be entitled to live on the land and cultivate the same either for their joint account or each for himself according as they shall agree. (2) "That they shall never be allowed to sell or encumber either the land or the buildings, it being the testators' desire that the said land . . . shall have to be and remain a patrimony (*erfgoed*) for their children and further descendants under the same limitations as those under which their children shall assume the same at the death of the surviving testator." The plaintiffs being some of the grandchildren of the testators contend that the restraint against alienation applied only to the testators' children but not to their further descendants, but defendants, who are executors dative of the testators, contend that the restraint applies to all subsequent descendants of the testators in perpetuity. I am clearly of opinion that a *fidei-commissum* extending beyond the first generation of descendants was intended to be created, and that, therefore, the plaintiffs, as grandchildren, are not entitled to sell their shares of the property free from any restraint. On the other hand I cannot agree to the view that the *fidei-commissum* is to last in perpetuity. It is a well-established rule of construction that a *fidei-commissum* should be confined to four generations, counting from the first fidei-commissary heir or legatee, unless the testator had expressed a manifest intention to the contrary in the will. (*Groenewegen ad* Nov. 159; *Voet*, 36, 1, 33.) The words of the will now in question are "that the land shall have to be and remain a patrimony for their children and further descendants." These words do not indicate a manifest desire on testators' part to extend the restraint beyond the ordinary limits recognised by the law as being in accordance with the presumed intentions of testators. The Court will therefore decide the case stated in favour of the defendants' contention, limiting the *fidei-commissum*, however, to four generations of fidei-commissary legatees. The costs will be paid by the estate.

Their lordships concurred.

[Plaintiffs' Attorney. D. Tennant jun.; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton].

IN THE ESTATE OF THE LATE JAN M. HOETS. } 1896. March 2nd.

Mr. Graham applied for authority to the Registrar of Deeds to amend the transfers relating to certain landed property in St. Andrew's-square and Strand-street, Cape Town, purchased by the said Hoets from Bernardus J. Keyter, in 1879, by adding an extent omitted, and referring to a previous deed in favour of Nicol Stenkhouse, dated 11th February, 1848.

An order calling upon all parties concerned to show cause why the transfers should not be amended was granted; the application to be allowed as a matter of course if no objection is laid before the Registrar on or before 12th March. No further application need be made to Court.

EYTH V. EYTH.

This was an action for divorce brought by the plaintiff, a trader in Great Namaqualand, against his wife, by reason of her adultery.

Mr. Graham appeared for the plaintiff, and read the evidence taken on commission by the Magistrate of Springbokfontein.

It appeared from the evidence that the parties were married in Namaqualand in 1886, and three months afterwards defendant, then aged sixteen, left him, and has since, for practically the whole time, lived as the wife of a man named July, by whom she has had three children.

A decree of divorce was granted.

[Plaintiff's Attorney, G. M. Walker.]

BAM V. NEL. { 1896. March 2nd.

This was an appeal from a decision of the Resident Magistrate of Kenhardt in an action in which the present appellant, plaintiff in the Court below, sued the respondent Elias Abraham Nel, of Hartebeest River Mouth, in the district of Kenhardt, for the delivery of three oxen or their value, £15.

The defendant excepted to the summons on the ground that it did not disclose where the transaction took place.

This exception was overruled.

The defendant's agent then stated that the transaction, if there was one, occurred in a foreign State, where the parties were living at the time, and that consequently the Court had no jurisdiction.

Ruling on this question was reserved until evidence had been heard as to where the transaction took place.

The plaintiff's attorney admitted that the transaction took place in the German territory across the Orange River.

The defendant in his plea denied the allegations in the summons and pleaded the general issue.

He further counter-claimed for food supplied to plaintiff's wife and family, and for other necessaries when they were left in a state of destitution.

The plaintiff denied the counter-claim.

After evidence had been led which went to show that the contract had been entered into in German territory, the Magistrate sustained the exception that the Court had no jurisdiction, with costs.

The Magistrate's reasons were as follows: The exception of the defendant's agent was upheld on the grounds that the contract was entered into and was presumably to be carried out in foreign territory. The few available books of reference in my office contained no case bearing on the subject. Some days after the hearing of the case, the case of *Einwald* v. *German West African Company* (5 Juta, 86) was shown to me, and according to the principle there laid down, I then saw that the exception should not have been sustained, as the defendant was domiciled in this district when the action was brought.

The plaintiff now appealed.

Mr. Molteno was heard in support of the appeal.

By consent, the case was remitted to the Magistrate to be decided on its merits.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

CILLIERS' TRUSTEES V. CILLIERS. { 1896. March 4th. „ 5th.

Insolvency—Mala-fide alienation—Valuable consideration—Bona-fides—Ordinance 6 of 1843, section 83—Onus probandi.

A. *and* B. *were engaged to be married. In order to secure some provision for* B *they agreed that she should take over from* A. *certain landed property (of a Divisional Council valuation of* £550) *belonging to him, she taking over in satisfaction of the purchase price all liability for a bond of* £300 *then existing over the property, with interest.*

Subsequently A. *surrendered his estate as insolvent and was afterwards convicted of fraudulent insolvency,*

Though the actual contract of sale took place before marriage and at a time when it was not proved that A. *contemplated insolvency the formal transfer of the land was not made till a much later date; after the marriage and when* A. *was actually insolvent.*

The trustee brought an action under section 83 *of the Insolvent Ordinance, No.* 6 *of* 1843, *to set aside the alienation as* mala-fide.

Held that, *the defendant on whom under the circumstances lay the onus of proof of* bona-fides *in the original transaction having shown that the contract of sale was originally made* bona-fide *and for valuable consideration she was entitled to the property; even though the formal transfer was made at a time when* A. *was no longer solvent.*

This was an action brought by the trustees in the insolvent estate of Stephanus Abraham Cilliers against the wife of the insolvent for the purpose of setting aside a certain transfer to her of land situated at Ceres.

The declaration alleged that the estate was sequestrated on the 15th of May, 1895.

On the 16th March, 1895, Stephanus Abraham Cilliers, the husband of the defendant, transferred to her certain landed property at Ceres. The parties were married on 20th March, 1894, under an ante-nuptial contract excluding the marital power.

At the date of transfer the property was worth £550, and was subject to a mortgage bond for £300, which was taken over by defendant.

At the date of transfer the liabilities of Stephanus Cilliers, fairly calculated, exceeded his assets, fairly valued, and the transfer was and remained null and void in terms of section 83 of Ordinance No. 6 of 1843, as the transfer was not made *bona fide*, and for just and valuable consideration.

As an alternative the declaration alleged that the transfer was made when Cilliers was unable to pay or satisfy his creditors, and was made with intent to benefit himself and the defendant; that it was wrongfully and unlawfully made in fraud of creditors.

The plaintiff claimed:

(*a*) That the transfer by Cilliers of the 16th March, 1895, to defendant be declared to have been, and to be null and void.

(*b*) That the property so transferred be declared to form part of the property of plaintiffs in their capacity as trustees in the insolvent estate of Stephanus Cilliers.

(*c*) That defendant be ordered to transfer the property to the plaintiffs in their said capacity, for the benefit of the creditors; the plaintiffs offering to settle with and satisfy the mortgagee entitled to the mortgage of £300 taken over by the defendant.

(*d*) Alternative relief and costs of suit.

The defendant, in her plea, alleged that on the 15th February, 1894, she agreed, in contemplation of marriage, to purchase from Cilliers the landed property in question, then belonging to Cilliers, and registered in his name: and to take over the mortgage bond of £300 in satisfaction of the purchase price.

She denied that at that date the value of the property was more than £400, or that at that date, or at the date of the transfer, Cilliers' liabilities exceeded his assets.

The declarations of purchaser and seller were duly signed in March, 1894, and transfer duty was paid by defendant, but transfer was not then passed.

The sale was not made *mala fide*, but was for just and valuable consideration, and transfer was passed in the usual course of business in pursuance of the contract of sale.

From the date of sale defendant collected rents from the property, and paid rates and taxes.

Wherefore she prayed that the plaintiffs' claim be dismissed with costs. The plea to the alternative claim was general.

In case of the plea being overruled, the defendant alleged that in April, 1894, Cilliers, with her consent, sold movables belonging to her of the value of £124 10s., which were settled on her under the ante-nuptial contract after the date of the sale to her of the landed property, but before transfer.

The proceeds were expended by Cilliers with her consent in improvements on the landed property, as also were further sums amounting to £93 15s. belonging to her. The value of the landed property was thereby increased to the extent of at least £218 5s., and in case defendant should be ordered to retransfer the property to plaintiffs, she prayed that plaintiffs be ordered to pay to her the sum of £2 8 5s.

The replication was general, and on these pleadings issue was joined.

Mr. Graham and Mr. Buchanan for plaintiffs.

Mr. Searle, Q.C., and Mr. McGregor for defendant.

Cornelis Johannes Müller, clerk in the Master's Office, produced the records of Cilliers' insolvency, which took place on May 15, 1895. There had been a previous insolvency on March 19, 1884. In the first insolvency the deficiency was £3,256 8s. 5d. He was rehabilitated on

December 19, 1886, after a previous unsuccessful application. In 1895 the debts were £2,503 and the amount available for distribution £393.

Mr. Edward Ridge Syfret, one of the plaintiffs, said the action was brought in accordance with the resolution of creditors at the third meeting. His co-trustee was Mr. Van der Spuy. In May, 1895, Cilliers' estate showed a liability of £2,157 and assets £1,127, leaving a deficiency of £1,030. As a matter of fact, the debts proved were £2,503. Cilliers attributed his losses to three sources; one was his second "togt," but according to a statement he found that the second "togt" only resulted in a loss of £3 15s. 7d. All the other losses were before March, 1895. Insolvent admitted that he knew he was hopelessly insolvent in February, 1895. The date of the transfer was March 16, 1895. Insolvent had been convicted of culpable and fraudulent insolvency. Cilliers gave him a book purporting to show the condition of his estate in March, 1894, when he was married. His assets were given as: 2,179 sheep and goats, worth £981; thirty head of cattle, £120; three horses, £60; furniture, £75; and sundries, £20; total, £1,256 1s. He then deducted 600 ewes at 9s. each, given to his wife—£270. He deducted the one from the other, and made the result £1,086, whereas it should be £986. He put down his liabilities at £703, leaving a balance of £283. The books were quite insufficient, and witness had found there were debts amounting to £220 which were not included in that £703. He felt certain that Cilliers owed much more than that. In the schedules Cilliers put down the sheep at 9s. each. They realised between 5s. and 5s. 9½d. each. A fair value would have been 7s. each. He reckoned that at the time of the transfer of the property, and allowing £256 for the loss on the first "togt," and £318 loss on farming, Cilliers was £290 in debt. Nothing was said until the plea was filed about a sum of £218 being put into the house. Cilliers had distinctly said that it was used in the business.

Cross-examined: Prior to August, 1894, 800 sheep of Cilliers' had died, and 700 poor and scabby ones were left. The amount of "£70, Victoria," brought up in the schedules, was made up of small amounts. Cilliers did not say that debts due to Spiers, Arnold, and Goldman were included in that £70. During the latter part of 1894 Cilliers wrote to several creditors stating that his sheep were in good condition. Since then he had said they had died wholesale. The trustees could not verify either statement because they were in the hands of Cilliers, his brother, and another relation,

Re-examined: Cilliers had said that after March, 1894, not more than £20 had been spent on the property.

By the Court: So far as he could gather Cilliers' wife brought nothing into the estate except perhaps a few pounds.

Mr. B. Hogsett, manager for Mr. J. Garlick, Cape Town, said he knew the insolvent. On January 20, 1895, Cilliers said that he had 1,200 sheep on his brother's farm at Fraserburg, and four houses in Ceres village, valued at £900, bonded for £300 to Mr. Logan.

Alexander Bergmann, auctioneer at Ceres, said the property in question was in the main street of Ceres. Its present value was a little over £600, which was the Divisional Council valuation. During 1894 to the early part of 1895 improvements had been made to the property. Cilliers always referred to the property as his own, and said the improvements were made at his instance. Prior to the improvements the value of the property was about £450. From his experience 9s. each was a high price to put on a flock of ordinary sheep. The rents of the shops on the property, exclusive of that occupied by Mr. Cilliers, were £4 10s. per month.

Cross-examined: He believed that in 1893 there had been some sort of a formal putting up to auction of the property in question, but he did not believe it was intended to sell the property.

For the defence,

Carlotta Johanna Cilliers (born Bosman), the defendant, said at the time of the marriage she had been living at Beaufort West. Since May, 1894, she had lived at Ceres. An ante-nuptial contract was drawn. Before the marriage she had an agreement with her husband for the sale of the property at Ceres to her. She was to take over Mr. Logan's mortgage. Her husband gave her 600 sheep and a cart and horses as a marriage gift. After marriage she went by her own cart and horses to her brother-in-law's farm. Her husband there marked 600 sheep with her mark. When she left the farm she let the sheep to her brother-in-law at 1s. per sheep per year. Half of them had died and she was not entitled to the increase. The cart was sold for £75 on the return journey from the farm. The horses were taken on "togt," and sold for £35, and the harness for £10 10s. She had to have the house at Ceres done up before going to live there. She had £60 of her own at marriage. Her husband was away on his first "togt" between June and November, 1894, and during that time the improvements to the house were continuing. She paid £40 out of her own pocket to carry on the work. She had advanced money out of her own pocket for her husband to purchase woodwork, &c., on one occasion £20, on another £10,

and other smaller amounts. She now received £5 a month for the property in rent. She had paid rates on the property. The property had been improved by her to the extent of £200. The £75 purchase-price of her cart had been paid to her husband, who had spent it.

Cross-examined: She had known her husband for eight or ten months before marriage. She knew her husband had property at Ceres before marriage. She asked that it be made over to her, because when people made proposals to her she always asked for something in return. Her husband had not suggested the gift of the property, but had given the sheep on his own initiative. In spite of the fact that about £70 had been spent on the house in 1893 it was still uninhabitable when she went there. New floors and doors, walls plastered, &c., were the works necessary when she went to live there. She had bought furniture since marriage, and had not paid the full amount up to the present.

Re-examined: Logan held her liable for the whole of the interest now owing.

Witness said she came as a poor woman before the Court. It was an honest sale, and she hoped the Court would believe her.

Mr. Henry Carsons, secretary of the Ceres Divisional Council and chairman of the Ceres Municipality, said he was a sworn appraiser, and had been requested in February, 1894, to make an appraisement upon the property for the purpose of transfer duty. He then considered £400 a fair value. Cilliers had requested him to hurry the transfer through. The property was worth £200 more now than it was then. In 1893 he put up the property to public auction, when £300 was offered.

Cross-examined: On the 1st of February, 1895, he wrote to Mr. Garlick stating that the property had been sold or was about to be sold. The building in 1893 had a thatched roof. Early in 1894 an iron roof and verandah were erected on the building, and late in 1894 improvements, consisting of another iron roof, flooring, ceiling, and plastering, were finished. In October and November, 1894, he collected the rent of one of the shops on the property in question on account of Cilliers, though really he gave up collecting for Cilliers after his return to Ceres in May, 1894.

Mr. Johannes B. Keat, a superintendent for the Ceres Municipality, appraised the value of the improvements to the building since May 1894, at £218 5s.

Stephanus A. Cilliers, husband of the defendant, said that prior to 1893 he farmed for three years in the Fraserburg district. He bought the property in question in 1885 for £300. In February, 1894, when he was about to be married, his wife asked him for the property, and he said that if she would take over the bond she could have the property. He gave her 600 sheep, and a cart and pair of horses. The cart cost £66. He was at the time of the marriage after making the gifts, quite solvent. In that statement of debt "Victoria £70," was included the debts owing to Spiers, Arnold, and Goldman. There was one other debt amounting to £50, which he had not reckoned in the statement which he drew up to show that he was solvent at the time of marriage. After marriage fully £200 had been paid to repair the Ceres property. He paid £50, or more, of that amount. He had received £75 of his wife's money for the cart, and he spent that in the improvements. With respect to Arderne's proof of debt for £54, he had used £20 worth of the goods in the improvements. A previous paid account of £45 of Arderne's was for goods used in the buildings and the payment was made with money gained from the sale of the horses given to his wife. At the public auction in 1893, he did his best to sell the property. He would have sold it then even for £350. When he surrendered his estate he had not known that the property had been transferred to his wife.

Cross-examined: At the time of his previous insolvency the law did not compel him to keep books.

The Chief Justice: The law dates back from 1843.

Witness said he did not know that. He had not put the property given to his wife in the ante-nuptial contract, because there was a bond on the property. He had never paid entirely for the cart, and he owed some money to the wagonmaker when he was married. He had not told any of his creditors of the sale to his wife. The material for the improvements to the property he got from Arderne, De Waal, and De Kock, and about £5 worth from Bauman.

By the Court: At the time of his marriage, and considering the arrear interest, £300 was a fair price for the property.

Mr. Carson (recalled) said that between 1889 and 1894 property at Ceres had risen in value.

Mr. Frost Bonnes, accountant, said that from the books of Cilliers at the time of his marriage he had capital amounting to £283.

As rebutting evidence on the question of the value of the improvements,

Pieter Coetzee, builder, Ceres, said he was employed by Cilliers to repair the premises. He did by far the greater portion of the work in the house. He did not know that Mrs. Cilliers

had anything to do with the matter. He got £28 or £29 in cash for his work, and £5 old material. In addition. a Mr. Whitehead had done £2 or £3 worth of work. Cilliers had provided the material.

Cross-examined: There was in addition some painting, paperhanging, plastering, and mason work done. He did no work whilst Cilliers was away on "togt."

Re-examined: He had sent in an account whilst Cilliers was away, but Mrs. Cilliers said he must wait until Cilliers came back, as she had nothing to do with it. The appraisement of improvements furnished by Keats was excessive.

George Bartman said he had done painting work inside and outside the house, and had been paid £5 by Cilliers.

Cross-examined: Cilliers provided the material.

Mr. Graham: The question of the *onus probandi* under section 83 of the Ordinance No. 6 of 1843 is an important point in this case. See as to this, *McLeod's Trustee* v. *Benjamin* (Buch. 1877, p. 152). The plaintiff has to prove merely that at the date of formal transfer—not at the date of the transaction—the defendant's assets fairly calculated were below his liability, and the defendant's *onus* then comes in to show that the consideration was just and valuable.

As to the question of *bona-fides* and valuable consideration the value of the property is most significant.

In 1889 the property was valued at £550 and there has been a general rise in value in Ceres since. It is almost incredible that in 1895 Mr. Carson values the land at £400 and the improvements at £200. At the date of the transaction in question there were two years' interest due on the mortgage bond.

In considering the question of *bona-fides* his estimate of his position as drawn up by the insolvent in March, 1894, before his marriage, has an important bearing. These entries in the pocket-book are made in pencil, apparently made at one time and evidently copied from another book which is not produced, and it is significant that no mention was made of this book at the insolvent's examination before the Resident Magistrate.

Chief Justice: If you hold that he knew that he was insolvent at the time before marriage why didn't you upset the *whole* ante-nuptial contract?

Mr. Graham: We could have done so but it was not worth while. It is an extraordinary thing that, as defendant alleges, she should demand as a wedding present the whole of his property. He should rather have sold the sheep and cleared off the bond.

Chief Justice: If that were a present it would utterly fail—the essence of her defence is that it was a sale, and we must protect the wife if innocent, whatever our opinion of Cilliers himself may be.

Mr. Graham: As to the true nature—whether present or sale—an important point is that the whole transaction was kept so secret. Moreover her intimate relationship to him as being his *fiancée* strongly tinged the transaction with suspicion.

If he was solvent at the time of this gift or sale, why did he not pay off his interest on the bond, as the creditors must have been pressing then. The strongest argument is that the ante-nuptial contract settled all this other property on her but not the land, for that would at once have brought things to the notice of the creditors, who would at once have taken steps against him.

After his marriage he continues to incur further liabilities, credit being given in faith of the land being registered in his name.

As to his wife's (the defendant's) *bona-fides* she first puts in a claim in his insolvent estate (which was rejected) for money advanced by her which was alleged to have been spent by him; now she claims that it was with her consent spent on the property for her.

The Chief Justice said: The case has been fairly and fully argued on behalf of the plaintiff by Mr. Graham, but he has not succeeded in convincing the Court that this was a transaction which ought to have been set aside as being null and void under the 83rd section of the Insolvent Ordinance. The transfer was effected to the defendant by the insolvent in March, 1895, and he became insolvent in May, 1895, therefore it was only a few months before the insolvency that this transfer was effected. I quite adhere to the decision in *McLeod's Trustees* v. *Benjamin* (Buch. 1877, p. 152) referred to by Mr. Graham that under circumstances like the present the onus lies upon the defendant to show that the transaction was *bona fide*, and was upon just and valuable consideration, and the only question that the Court has to determine is whether the defendant has proved by the evidence given on her behalf that the transaction was *bona fide*, and was upon just and valuable consideration. If this transfer were founded upon a sale which took place at the time of the transfer, it would have been impossible to hold that it was a *bona-fide* transaction, but the transfer took place by virtue of a contract entered into between the insolvent and the defendant before marriage. I do not think that the trans-

action before marriage should be relied on as any consideration of marriage, because if the marriage were the consideration, I think that the transfer ought to have been mentioned in the ante-nuptial contract. We may therefore consider this as a contract between two independent persons, entered into in February, 1894. Now comes the question, first of all as to whether the consideration which she gave for the transfer was just and valuable consideration. There was owing on the property a sum of £300 and two years' interest on the mortgage £36. Therefore she paid practically £336 for this property. At that time, February, 1894, this property was undoubtedly valued for Divisional Council purposes at the amount of £550. If this is to be taken as a fair valuation of the property the discrepancy between the price paid and the true value of the property would be so great as to debar the Court from holding it as just consideration. But then at that time a valuation was made by Mr. Carson, whom we must consider a fair valuator who knows the district, and he valued the property at £400, and the Government accepted the valuation because it was upon £400 that the transfer duty was paid. There was very important evidence given in this case in regard to the attempted sale which took place only a few months previous to this transaction. Mr. Carson was employed as the auctioneer to sell the property, and he advertised it extensively in a Dutch newspaper, "Ons Land," and distributed handbills giving notification of the auction. He had every inducement to effect a sale—there is no suggestion that Mr. Carson had a hand in any plot whatever - and he had every inducement to get the best price he could for the property. The highest bid he could get was £300, and it turned out that that was not a *bona-fide* bid, but a bid made at the request of the seller himself. But taking it as a *bona-fide* bid, an offer was made a couple of months before the transaction in question of £300 only for the property; and then we cannot lose sight of the fact that Cilliers had only paid £3 0 for the property about seven or eight years before. No doubt there was some rise in the value of property in that period, but the rise was not so great as to justify the Court in holding that there has been no just and valuable consideration. The difference between £400, which must after all be taken as the fair value of the property, and £336, is not so great as to justify us in saying it is no just consideration. If it had been a sale between independent persons, the Court would decidedly have upheld it. The purchaser had slightly got the better of the seller, but very slightly, and the consideration was perfectly valuable. Then the only question now is, was it a *bona-fide* transaction? Of course one is inclined at first to be prejudiced against the parties to the transaction, seeing that the insolvent, defendant's husband, has been found guilty of fraudulent practices in connection with the estate. I have nothing to say in favour of the insolvent, but he has been punished for his offence, and we have not to consider the insolvent so much as his wife. It is against her that the action is brought, and she entered into the contract before the marriage. Her sole object before marriage was to secure herself, and it was a very natural desire. Her husband had been married before, and had children by his previous wife, and she thought it was her duty to protect herself. She spoke about a custom of the country, but it is a custom everywhere that the intended spouse should have a right to secure herself in case of misfortunes after marriage. It is a perfectly legitimate object, and so far as she is concerned the transaction was a perfectly *bona-fide* one. It is contended that the insolvent was not acting *bona fide*, but I don't think we ought to consider that the insolvent had a fraudulent intention in the action which took place before marriage. At that time he was not contemplating sequestration of the estate. He wished to marry this lady, and when she suggested that she should be secured by purchasing the property for the amount of the mortgage he was agreeable. If there was perfect *bona fides* before marriage I think that the fact that the insolvent's circumstances had got worse before he passed transfer ought not necessarily to decide the case in favour of the plaintiffs. If Mrs. Cilliers had at any time between the date of her marriage and the time of the transfer brought an action against Cilliers to compel him to pass transfer there could have been no defence. He would have been compelled to do it. In March, 1895, he did what the law compelled him to do, namely: passed transfer by virtue of a *bona fide* transaction which had taken place before marriage. If these views be correct, this transaction was *bona-fide*, and the transfer was *bona fide* upon just and valuable consideration, and the plaintiffs' case will fall to the ground entirely. As to the onus of proving the *bona fides* it lay upon the defendant, and in my opinion she has satisfied the Court. It is to be regretted that the plaintiffs in this action, as an alternative count, did not claim under the 83rd section every amount expended by the insolvent, after marriage, upon this property; because if any sums have been so expended out of his own funds on this property,

they would have been gifts made by the husband which could be set aside under the 83rd section. After the evidence I think there is proof that a considerable portion of the creditors' money has gone into this house, and that the defendant has had the benefit of it. How much money has so gone exactly it is difficult to say. I am inclined to think that at least £100 has been utilised by the insolvent for the purpose of improving his wife's property, and if the action had been so framed as to include this £100 from the evidence given here, I should have been prepared to give judgment for £100 for the plaintiffs. But the case is not so framed by the plaintiffs that we can include that item in our judgment. Still I trust that the defendant will bear in mind what we have said on this point, so that if there is a claim made for that amount the defendant may know what impression the evidence, so far as it has gone, has made upon the mind of the Court. For the present, however, the judgment is for the defendant with costs.

Mr. Justice Buchanan said: I wish to add that I quite endorse the idea that the creditors, in attacking this transaction, had the right to assume that the date of the transfer was the date of the transaction. But when it came into Court, and the defendant proved that the transaction was entered into *bona fide*, and for just and valuable consideration, and when it is not proved that the insolvent was in insolvent circumstances then, I think that the defendant is entitled to succeed. I also wish to endorse the remark of the Chief Justice, that a fair amount of the creditors' money has gone into this property.

Mr. Justice Maasdorp concurred.

Defendant's expenses as a witness were allowed.

[Plaintiff's Attorney, Messrs. Findlay & Tait; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.]

REVIEW OF MAGISTRATE'S SENTENCES.

REGINA V. PIETRUS. { 1896. March 12th.

Mr. Justice Buchanan mentioned this case, which he said had come before himself and Mr, Justice Maasdorp for review. The defendant was charged under sections 27 and 28 of the Convict-stations and Prisons Management Act of 1888, with destroying a woollen blanket and attempting to escape. Prisoner pleaded not guilty. He was sentenced to three months' imprisonment.

The prisoner had clearly torn his blanket into strips. There was however no evidence of his having made any attempt to escape from prison but only of his having talked with another prisoner about the possibility of escaping. The charge must therefore be altered and the sentence reduced to twenty-one days' imprisonment.

REGINA V. P. ALEXANDER.

Mr. Justice Buchanan also mentioned this case. The prisoner was charged with contravening section 9 of the Police Offences Act, No. 27 of 1882, and was sentenced to pay a fine of £2, or in default, a month's imprisonment with hard labour. On the charge sheet it was stated that this was Alexander's second offence, but since then no trace of a previous conviction had been discovered, consequently the case must be treated as a first offence, and the sentence reduced to a fine of £2, or fourteen days.

PROVISIONAL ROLL.

STEENKAMP V. PAULSEN. { 1896. March 12th.

Mr. Molteno applied for provisional judgment on a mortgage bond for £50), with interest at 6 per cent. from February 1, 1895, and that the property specially hypothecated be declared executable.

Granted.

LUYT V. KRIEGLER.

Mr. Molteno applied for provisional sentence on a mortgage bond for £300, together with interest at 6 per cent. from January 1, 1895.

Granted.

S.A. ASSOCIATION V. VAN ZYL.

Mr. Smuts applied for provisional sentence on a mortgage bond for £1,350, with interest at 6 per cent. from May, 1895.

Granted.

WICHT V. HUDSON.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £500, and interest since July, 1895, and that the property be declared executable.

Granted,

ILLIQUID ROLL.

FLETCHER V. MCDONALD BROS.

Mr. Buchanan applied under rule 329 for judgment for the sum of £70 (less £15 paid on account), for rent due, together with costs.

Granted.

SOUTHEY V. LEEB.

Mr. Close applied for judgment under rule 329 for £150 (less £50 paid on account).

The order was not granted, the summons not being in proper form, and the Court not being prepared to allow an amendment, as the summons was issued over five years ago.

ADMISSIONS.

On the application of Mr. Smuts, Mr. Walter Ernest Warner was admitted an attorney and notary; the oaths to be taken before the Resident Magistrate, St. Marks.

On the application of Mr. Graham, Mr. Louis Ludolph was admitted as a sworn translator.

Mr. Smuts applied for the admission of Mr. Joannes van der Tuuk as translator in English, French, Dutch, and German.—The application was granted except as to French, Mr. Van der Tuuk not having been examined in French by a sworn translator in that language.

REHABILITATIONS.

On the application of Mr. Buchanan, the following persons were rehabilitated: Jan Daniel Krige, Henry Charles Schunke, and Alfred Hargreaves.

GENERAL MOTIONS.

THE PETITION OF ISIDORE HIRSCH.

Mr. Graham applied for the attachment of all shares, rights, or cash accruing to Alfred H. Solomon from the South African Nitrates Syndicate, *ad fundandam jurisdictionem* of this Court, in an action about to be instituted against him by edictal citation for the recovery of a sum due on a promissory note.

The Chief Justice said the best way would be to interdict Mr. Gibson, in his capacity of secretary of the South African Association, from parting with the property mentioned. The plaintiff might sue the defendant in the ordinary way. Mr. Gibson could be interdicted from parting with the shares and rights, pending the further order of the Court, with leave to both Mr. Solomon and Mr. Gibson to apply to the Court to set the order aside.

IN THE MATTER OF BEEDLE AND CO., LTD.

Mr Buchanan applied for an order in terms of the first report of the official liquidators previously published.

The Court made an order fixing the remuneration of the liquidators at £60, and, in terms of the report, appointing Mr. Gus Trollip attorney to the liquidators, and fixing the 1st May as the date after which no debts may be proved.

ROBERTSON V. MOWBRAY MUNICIPALITY.

Mr. Stoney applied to have the award of the arbitrators in the matter in dispute between the parties made a rule of court with costs.

Granted.

FEBRUARY V. KIRBY AND ANOTHER. { 1896. March 12th.

Mr. Graham applied to make absolute the rule *nisi* for an interdict restraining the respondents from continuing excavations or constructing a manhole in connection with the drainage works in front of applicant's property in Jordaan-street, Cape Town, pending an action for the removal of the nuisance and for damages.

Mr. Juta, Q.C., appeared for the respondent.

Mr. Graham said the plaintiffs intended to bring an action.

The Chief Justice said the rule would be discharged. The question of costs would stand over until the action was brought. If it was not brought another application could be made.

[Plaintiffs' Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

MCLEOD V. CAPE NITRATES SYNDICATE.

Pleadings—Time for amendment.

Mr. Stoney, for the defendants, applied for leave to amend their plea in the suit between the parties so as to place on record the fact that the plaintiff is not a shareholder in the defendant syndicate, and is consequently not entitled to any judgment under his claim as such.

Mr. Sheil appeared for the plaintiff, and applied for a commission to take the evidence of the plaintiffs who is in England.

The Chief Justice: In this case the Court ought to allow the amendment to be made. The Court has always encouraged the making of

amendments before the parties come to trial. It appears to me that no application would have been made for a commission in England but for this application for amendment. The commission was not considered of sufficient importance for a substantive application for it to be made. It appears to me that the case might have been brought on in the February term, while Mr. McLeod was here. Now he asks for a commission. I think he ought to be back on the 29th May; there is ample time. If he is not back, there will then be an opportunity for an application to be made. The Court will therefore grant leave to amend the plea with costs, save and except costs necessitated by the amendment, which of course must be paid by the defendant, and the application for a commission must be refused with costs.

THE PETITION OF J. F. WILDREDGE.

Mr. Watermeyer applied to make absolute the rule *nisi* for registration in the name of the petitioner of the remaining extent of the farm Nooitgedacht, situated in East Griqualand, he having purchased an undefined half-share of the said farm at a sale in execution, and having since then come to an arrangement to take over a defined portion agreed upon.

The Court ordered the matter to stand over until April 3.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN.]

THE PETITION OF JAMES BONNAR. { 1896. March 13th.

Mr. Buchanan applied for leave to sue by edictal citation in an action against petitioner's wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion. The petitioner resides at Umsimkulu, in Pondoland.

Granted.

IN THE MATTER OF THE MINORS VAN DER HOVEN

Mr. Molteno applied for authority to the father of the said minors to exchange a one-eighth share of the farm Slang Kop, in the district of Willowmore, devolving upon them out of the estate of their grandfather for certain erf and dwelling-house in the village of George, the said share being of no value to the minors, and it being to their advantage that the village property should be acquired.

Granted.

In re WHITE'S ESTATE. *Ex parte* WHELAN. { 1896. March 13th.

Where property in the joint estate of a lunatic and his deceased wife was required to be sold to pay off a debt due by him,

The Court *ordered the sale on the application of the curatrix of his property who was also the executrix dative of the lunatic's deceased wife; and ordered further that any balance be paid over to Government in satisfaction of a monthly claim of 5s. on the lunatic's estate for his maintenance.*

This was the application of Catherine Whelan, who was executrix dative in the estate of the late Margaret White (born Whelan), but applied in her capacity as curatrix of the property of the said Margaret White's surviving husband John Walter White, a lunatic detained at the Robben Island Lunatic Asylum. Leave was prayed to sell certain land in the joint estate on which there was a mortgage of £50; in order to pay off the further outstanding debts due by the joint estate amounting to £60.

Mr. Close applied.

The Master recommended that leave be granted and that the balance of the estate after realising the property and paying the debts be paid over to him to be transferred to the Government in settlement of the claim by the Government for 5s. per month payable out of the lunatic's estate as maintenance under the order of Court of the 18th of June, 1895.

The Court granted an order in terms of the Master's report.

[Applicant's Attorney, P. J. Brink.]

Ex parte JOHANNES P. J. HENKES. { 1896. March 13th.

Where a deed of transfer contained a clause "to A., in trust for . . . . and such other children *as may be gotten* by his wife Martha Wilhelmina Adrianse" *and the Registrar of Deeds refused to pass transfer to the surviving children as Mrs. Adrianse was still alive though seventy-eight years old,*

The Court *ordered transfer to be passed, as owing to the lady's age no conflict of interests through the birth of further children could be expected to happen.*

Mr. Graham applied for authority to the Registrar of Deeds to recognise certain six persons mentioned in the petition as the children of the said late Jan Henkes, and as such entitled under his will to deal with a certain farm known as Macassar, in the Cape Division, bequeathed to them, subject to a life interest to the surviving widow.

The transfer of the property had been passed to Jan Henkes containing a clause "to Jan Henkes in trust for (certain children mentioned) and such others as *may be gotten* by his wife Martha Wilhelmina Adrianse."

As Martha Wilhelmina Henkes (formerly Adrianse) was still alive the Registrar of Deeds refused to allow the passing of a bond, as the clause might refer to children that she might bear as his wife or to any children she might bear whether before or at any time after his death.

The Chief Justice: As this lady is seventy-eight years old the question of conflict of interests through possible children cannot now arise. The application is granted.

[Applicant's, Attorney, C. C. Silberbauer.]

CONNELL V FACTOR AND LAX. { 1896. March 13th.

Spoliation—Restoration—Promise to pledge —Forcible seizure.

It was alleged that a contract to pledge a wagon and donkeys had been made but no delivery had been effected, and that the respondents, who took possession of the wagon while standing in the highway, were entitled to retain possession on the ground that as between the parties delivery by the pledgor is not essential to a contract of pledge.

The Court held, *that at most a mere promise to pledge had been given and that the respondents were not entitled to seize the articles to enforce the fulfilment of a promise. It accordingly ordered the restoration of the articles on the maxim* spoliatus ante omnia restituendus.

This was an application on the return day of a rule *nisi* (granted on 18th February), calling upon the respondents to show cause why they should not restore to the applicant a certain wagon and four donkeys, his property, and pay the costs of the present application.

The facts as deposed to by the applicant are briefly these:

On the 26th August, 1895, the applicant was residing on the respondent's farm De Riet, in the district of Fraserburg, on which he had been working for the respondents from the previous November.

On the first-mentioned date he was about to leave the farm, having his four donkeys and wagon inspanned, when the respondents took possession of the wagon and donkeys, alleging that the applicant was in their debt.

This the applicant denied and asserted that they were in his debt. The respondents denied this and insisted upon retaining possession of the wagon and donkeys.

In November, 1895, the applicant sued the respondents in the Magistrate's Court for the balance due to him, £17 16s. 10d., and obtained judgment with £7 costs.

The respondents paid the costs, £7, but refused to pay the £17 16s. 10d., and the applicant alleged that as he was too poor to give the necessary security he could not obtain a writ of attachment for the £17 16s. 10d.

On the 8th January, 1896, the respondents were tried at the Periodical Court of Williston, upon a charge of the theft of the wagon and donkeys laid by the applicant.

The accused produced evidence to show that the applicant had pledged to them the wagon and donkeys, and the Magistrate dismissed the case.

The respondents refused to return the wagon and donkeys and the applicant now prayed for relief.

Mr. Graham was heard in support of the application.

The Court granted a rule *nisi*, returnable on the 29th February, calling upon the respondents to show cause why the applicant's prayer should not be granted.

On the return day Mr. Graham applied to make the rule absolute.

Mr. Smuts appeared for the respondents: Two points were to be considered, was Connell indebted to respondents, and was there a pledge? The evidence in the criminal trial proves there was a pledge, but was it valid? The applicant relies on non-delivery, as he cannot deny there was a contract of pledge.

Chief Justice: But he does implicitly deny it: for he denies the debt itself all the way through.

Mr. Smuts: Both in Roman-Dutch and in Roman law to constitute a pledge as between

the parties no delivery is necessary. If it is held there was no delivery, see *Burge* (Vol. III, pp. 571, 572); also *Tatham* v. *André* (1 P.C. [New Series], pp. 408, 409). The reason for requiring delivery is only to protect innocent third parties. But respondents contend that there was delivery: for in delivery the mere *capacity* to control suffices, this is constructive delivery, and this there had been.

Chief Justice: The question is simply—can a man take the law into his own hands and seize goods under a contract of pledge but not delivered? The evidence at the criminal trial shows that a *promise* to pledge was made, and in the trial respondent stated that there was no delivery, now he alleges that there was.

Mr. Smuts: The respondent's statement at the trial was due to ignorance of the technical meaning of "possession"—he did not know anything of constructive delivery. The respondents had this *possessio brevi manu*, as their servants were already *detentores* of the property, and all that was further required was the mental act. In any case the Court has not sufficient evidence to warrant an order: the applicant should go to the principal trial.

The rule was made absolute with costs.

The Chief Justice: The Court will grant the rule *nisi* calling upon the respondent to show cause why certain wagon and donkeys, which have been seized by the respondents, should not be restored to the applicant. It appears that on the 26th August last the applicant was at the respondents' place of business with his wagon and four donkeys, and while he was in the respondents' shop they seized the wagon and the four donkeys which were standing outside in the public road, and the respondent justified this seizure on the ground that there had been a pledge by the applicant of the wagon and donkeys. There is nothing to show that there really was any debt owing by the applicant to the respondents at all. After the seizure the applicant at once took criminal proceedings against the respondents; but these criminal proceedings were dismissed on the ground that it was not a case of theft. The applicant then proceeded civilly, and obtained judgment, and that judgment still stands. Now, assuming for the purposes of argument that there was a debt, and that there was a promise on the part of the applicant to pledge these articles as security for the debt, it is quite clear from the evidence that there never was delivery, and the respondent Factor, in his affidavit makes statements which conflict with his own statements made in the criminal case before the Resident Magistrate, where he stated that he had never obtained possession of these articles. Now he says that his servants had possession. I am quite satisfied that if these servants had on his behalf obtained possession of these articles he would have stated that fact before the Resident Magistrate; but in cross-examination he admitted there had been no possession. The utmost it comes to is this: There may have been a debt owing, and the applicant may have given a promise to the respondents to pledge these articles. Now that, in my opinion, does not justify the respondents in taking the law into their own hands, and seizing these articles. If they had been in respondents' possession, and the applicant had taken them out of their possession, the respondents would have been entitled to re-take them, the spoliation beginning with the applicant. But there was no such spoliation by the applicant. He stopped on the highway and the respondents had no right (even if there had been a promise to make a pledge) to lay their hands on the wagon and donkeys in order to enforce the fulfilment of a promise. For this simple reason I am of opinion that the applicant ought to succeed, the maxim applying *spoliatus ante omnia restituendus*. The Court orders that the property be restored to the applicant. The rule will therefore be made absolute with costs.

Mr. Justice Buchanan: I concur.

[Applicant's Attorney, C. C. Silberbauer
Respondents' Attorney, G. M. Walker.]

THE CAPE TRANSVAAL GOLD-MINING ASSOCIATION. } 1896. March 13th.

Mr. Graham applied for an order in terms of the third and final report of the official liquidator. The report stated that in the opinion of the official liquidator the company should be dissolved, and the money in hand paid to the contributories within three months.

The Court granted the order in terms of the report.

THE PETITION OF SUSANNA M. E. SMIT.

Mr. Tredgold applied for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, the custody of the minor children, and the forfeiture by him of his half-share in the community of property.

Granted: the summons to be returnable on May 14; personal service to be effected.

IN THE ESTATE OF THE LATE DAVID S. DAWSON.

Mr. Molteno applied for authority to the Registrar of Deeds to pass transfer to the said

estate of certain six pieces of land, situated at Port Elizabeth, purchased from the estate of W. D. Jennings and from J. J. Holdsworth and the estate of the late Richard Tee over forty years ago, but never transferred.

The Court ordered that application under the Titles Registration and Derelict Lands Act, 1881, should be made to a judge in Chambers.

IN THE ESTATE OF THE LATE SALASSA SIMONSE.

Mr. Smuts applied for authority to the executors of the said estate to sell certain two erven with the buildings thereon, situated in the village of Paarl, bequeathed to the children of a son of the said Simonse, and distribute the proceeds among those entitled thereto, the buildings being in a dilapidated condition, and it being for the benefit of all concerned that the property should be disposed of.

Granted.

In re MINOR VAN NIEKERK. { 1896. March 13th.

Transfer—Consent of bondholder—Minor.

A., *a widow, held certain landed property subject to a reversion in favour of* B. *should* A. *re-marry.*

On the re-marriage of A. *transfer could not be passed to* B., *as the consent of the bondholder could not be obtained.*

The Court *authorised a sum of money to be raised sufficient to pay off the mortgage, and ordered transfer to be passed to* B., *assisted by her father, saving the rights of reversionary heirs.*

This was the petition of Mrs. Vermaak (previously Mrs. Van Niekerk) with reference to the transfer of certain landed property situated at Uitenhage, in the estate of the late Jan Anthony van Niekerk, jun., which was left to her as his surviving widow subject to reversion to his niece, Florence van Niekerk, should she herself re-marry. On re-marriage she was unable to effect transfer to Florence van Niekerk (then a minor) owing to the hypothecations. There was a bond (bearing no interest) in favour of Jan van Niekerk, sen., but the latter was dead and the necessary consent could not therefore be obtained, Leave was prayed to raise money at 6 per cent. to pay off this bond and prevent the realisation of the property. There was also a second mortgage, the holder of which was willing to accept a new second mortgage after the transfer in lieu of the old.

The Master recommended transfer direct to the minor. Mrs. Vermaak had been appointed tutrix to Florence under the will, but the father of Florence was still living and Mrs. Vermaak had not received letters of administration. As the father was not expressly excluded under the will, the Master recommended that the minor should be assisted by him and that the transfer should secure the rights of reversionary heirs.

Mr. Graham applied.

The Court granted an order in terms of the Master's report.

[Applicant's Attorney, C. C. Silberbauer.]

REGINA v. SWART. { 1896. March 13th.

Evidence—Accomplice—Corroboration.

A prisoner may be convicted entirely on the evidence of an accomplice provided there is some proof aliunde *of the actual commission of the crime.*

This was an appeal from the conviction of the accused before the Resident Magistrate of Bredasdorp on a charge of housebreaking with intent to steal and theft. The papers had been sent to the Attorney-General, and afterwards the case was remitted to the Resident Magistrate for trial.

The trial was held on 13th January, 1896.

The accused, Daniel Swart was alleged to have committed the offences on the 30th December, 1895, at the house of one Philip Albert Myburgh, and the articles stolen were 2 lb. of fat, some jam, and some cash.

For the prosecution,

Philip Albert Myburgh said: The accused lived on an adjoining farm. On the 30th December, 1895, I left the farm in charge of Piet Swart and locked up the house before leaving. Piet had an outside room. Accused was there when I left. I returned some days later and found some of the doors had been broken open, and keys had been removed from the insides of locked doors. Some fat, jam, and money were missing. Piet Swart for two days denied any knowledge of the affair. I promised he would not be punished if he confessed. He then said that he and accused had broken open the house and taken the things now missing, giving some fat to the mother of accused. Piet is fifteen years old, honest, and has previously been in charge of the house like this.

Susanna H. Myburgh corroborated, and said that the mother came and stated that the two boys had given her the fat, saying that Mrs. Myburgh had sent it to her.

Piet Swart said that accused was on the farm when Myburgh left. Accused broke the doors and picked the locks. I was with him and helped to eat the jam and also some fat. We took the fat away with us, but it was accused who gave it to his mother saying Mrs. Myburgh had sent it.

Catherine Swart said that Piet had given her the fat.

Prisoner in his statement denied Piet's story. The fat was given by Mrs. Myburgh to Piet and by Piet to the mother.

The accused was sentenced to six months' imprisonment with hard labour.

Against this conviction the prisoner now appealed.

Mr. Sheil Assistant Law Adviser, appeared for the Crown.

Mr. Watermeyer, for the appellant, argued that the evidence as a whole, the question being purely one of fact, is not such as a jury would have convicted upon. Much of it was hearsay, being evidence as to conversations between complainant and the other servants and the mother of the accused. If it had remained a mere preliminary examination it would not have been so important, and as a fact Resident Magistrates do take considerable licence in admitting hearsay in such examinations. But this becomes important when the case is remitted under Act No. 3 of 1861 for trial to the very Magistrate who has been accepting the hearsay. Under Ordinance 40 of 1828 the admission of such hearsay in a trial is a ground for review. What is meant in Act 3 of 1861 is that the Resident Magistrate shall read over the evidence to the accused, excluding all the hearsay and only taking so much of the evidence as is lawful evidence. See *Regina* v. *Klaas Mbungwe* (7 E.D.C., 19). It is not necessary to prove that the hearsay *did* influence the Magistrate but only that it *might*. The proper test is, was there, without the hearsay evidence, sufficient evidence to cause not a possible but a necessary conviction.

As to the conviction being one on the evidence of an accomplice only, the provisions in the Evidence Ordinance (No. 72 of 1832) have *technically* been complied with. It is true that such a conviction is lawful if there is proof *aliunde* of the commission of the act. But see *R gina* v, *De Kock* (1 Ros. 441), which shows that the Court has always been loth to convict on such evidence, the Ordinance being only permissive. Section 12 of Ordinance 72 of 1830 should only refer to strong clear cases. The practice of our Courts is close to that of the English Courts. See *Regina* v. *Farler* (8 Carr. and Payne 106), especially the dictum of Lord Abinger. That case resembles the present closely, in that prisoner was lawfully at the house and the chief evidence is that of an accomplice. The only corroboration in the present case (excluding the hearsay) is as to the fact of his being at the house, and as to the fat story. The evidence is loose and vague as to identifying the provisions stolen with those given to the mother. It is also signficant that for two days Piet refused to give evidence.

The appeal was dismissed.

The Chief Justice: No doubt in this case there was some hearsay evidence; but quite independent of that, there is abundant evidence to justify the Magistrate in convicting the prisoner. Whatever hearsay evidence there may have been was corroborated by the very persons themselves, who were alleged to have made the statements which were the subject of the hearsay evidence. Both witnesses confirmed the statements of each other on oath. In regard to the objection that the conviction was obtained on the uncorroborated testimony of an accomplice it is clear that as to the evidence of an accomplice, what our law requires is that there should be proof *aliunde* that the crime charged has been actually committed. The crimes charged are clearly housebreaking and stealing; and undoubtedly, as to both of these there is the necessary *aliunde* proof of commission. Mr. Myburgh came home and found the articles stolen, and the cash-box broken open. Then there is another fact; part of the stolen property was brought over to the prisoner's mother The question as to who actually brought it is immaterial if the prisoner was present when, as alleged, Swart handed this fat over to the mother. It has been suggested that this was not the fat stolen. The question was not put to Mrs. Myburgh at all whether she had given Piet Swart any fat, and all through the case it was assumed that the fat was that which had been stolen. The prisoner tells falsehoods; he said he had seen Mrs. Myburgh give that fat to Piet Swart. It is quite clear that if she had, this fact must have come out in evidence, whereas her statement is that the fat had been actually stolen. In this case there is ample corroboration, if any were required, and the appeal must be dismissed.

Mr. Justice Buchanan concurred.

[Appellant's Attorneys, Messrs. Reitz & Herold.]

SOUTHEY V. LEEB.

Mr. Close applied for an order for the attachment *ad fundandam jurisdictionem* in an action

about to be instituted against the respondent of certain money in the hands of the Midland Agency and Trust Company (Limited) of Graaff-Reinet; also for leave to sue by edictal citation, and for directions as to the service of the necessary process.

The Court ordered the attachment, with leave to the respondent to apply to set it aside. Mr. Silberbauer, who holds respondent's general power of attorney, having in court consented to accept service of process, no order was required for suit by edictal citation.

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

ADMISSIONS.

Ex parte DE WET. { 1896. April 13th.

Mr. Smuts moved for the admission of Mr. Nicholas Jacobus de Wet as an advocate.

Granted.

Ex parte BRAND.

On the application of Mr. Close, Mr. Philippus Albertus Brand was admitted as an attorney and notary of the Court.

PROVISIONAL ROLL.

PRINCE AND OTHERS V. C. J. N. DE JAGER.

Mr. Tredgold moved for provisional sentence on a sum of £168, with interest at 6 per cent. per annum from June 22, 1895, being two instalments of the purchase price of a farm, due under an agreement of sale.

Provisional sentence granted.

W. B. SHAW V. ADAMSON AND ANOTHER.

Provisional sentence—Promissory note—Liquid document—Extrinsic evidence—Ambiguity.

Where a promissory note contained an undertaking to pay certain money "on account of property at X.,"

Held *on suit by a third party* (*a* bona-fide *holder for value*) *that provisional sentence should be granted as the words should* prima-facie *be taken to be inserted not as a condition, but simply as a statement of the transaction which gave rise to the bill, and there was no sufficient proof that the holder or the original payee understood that the words imported any condition.*

This was an action for provisional sentence upon a promissory note in the following terms: "December 18, 1895. Three months after date I promise to pay £65 to Thomas Wright Shaw, on account of property at Claremont; value received. Payable at the office of W. B. Shaw."

There was an affidavit by Mr. David Adamson, one of the defendants, to the following effect:

That the promissory note sued upon was given to Thomas Wright Shaw (the co-defendant) in part payment of the purchase price of certain property situated at Claremont, bought from him on the 30th August, 1895, the note bearing the words "on account of property at Claremont."

That the plaintiff has been and is acting as agent for T. W. Shaw, and knows well the circumstances under which the note was given.

That deponent has paid a large portion of the purchase price and is prepared to pay the promissory note as soon as transfer in his favour is passed (referring to the terms of the broker's note); and that he has repeatedly demanded transfer without avail.

[The broker's note passed on the purchase of the property read thus: . . . . (the purchase price to be) payable £30 in cash, £70 on 2nd September, £200 in cash on or before the 31st December 1895, and £900 on mortgage at 6 per cent.: buyer to receive the rents after the 1st September and pay interest on £1,100 until transfer is taken . . . .]

There was also an affidavit by Mr. T. W. Shaw stating that the promissory note in question was given by him to plaintiff in considera- of disbursements on the defence of deponent in a late criminal trial.

That plaintiff was not deponent's agent for the sale, nor was he aware of any difficulty about transfer or of the note being dependent on transfer being passed.

In his answering affidavit, the plaintiff confirmed Mr. T. W. Shaw's allegations, and deposed that he took the note in good faith without knowledge of any defects, and without having seen the broker's note.

That he regarded the words "on account of property at Claremont" merely as an indication of the account against which the promissory note had to be credited by the payee.

Mr. Searle, Q.C., for the plaintiff.

Mr. Juta, Q.C., for the defendants, said that the defences were that the promissory note was not a liquid document upon which provisional sentence might be obtained, and that plaintiff was not the *bonâ-fide* holder. The meaning of the words "on account of property" would have to be explained, and the necessity for any extrinsic evidence deprives the document of its liquidity. The words might mean "on account of property delivered" or "to be delivered." There is an ambiguity: and as to provisional sentence being granted in such a case see dictum of Menzies (J.) in *Prestwich* v. *Robertson* (1 Menz., 27). The only meaning the words could have if held to be intelligible in themselves would be "as against transfer," which would make the note conditional, and therefore again illiquid. As to plaintiff's rights as holder, there would be a defence for Mr. Adamson against the endorser, Thomas Wright Shaw, the co-defendant, as he refused to give transfer; and the plaintiff, in taking over the note, must have known that the transfer had not been passed, and that the consideration for the note had therefore failed.

Mr. Searle said that the real point is, "Was the note conditional?" See Act 19 of 1893, section 82, as to definition of a promissory note. The broker's note and the conduct of the parties show that the parties considered the note as unconditional.

The Chief Justice said: The first ground of defence is that this document sued upon is not a promissory note because it is a conditional promise to pay. In my opinion it is a promissory note, and the words inserted were not intended as a condition, but simply as a statement of the transaction which gave rise to the bill—namely, the purchase of property at Claremont. This amount is part of the purchase price of that property. It would have been so understood if it had been a statement regarding chattels, say a pair of horses, and it should be equally so when it is a statement regarding real property. But that does not dispose of the case, because if the parties to this note understood the statement to mean that it was a conditional promise to pay, and a third party took the note with the full knowledge of the understanding, I don't think the Court would assist the third party in obtaining provisional sentence. But, in my opinion, there is no sufficient proof that as between the original parties it was understood that this statement in the note imported a condition; and if it does not appear clear between the original parties the Court would not allow that defence to be raised against the third party who has given value for the note. Provisional sentence must be granted with costs. Defendant may enter appearance and defend an action, when we should be in a better position to judge as to the true history of the case and as to the degree of knowledge of the plaintiff.

Their lordships concurred.

[Plaintiff's Attorney, D. Tennant, jun.; Defendants' Attorneys, Messrs. Reid & Nephew.]

BELL V. J. G. HORSFALL. { 1896. April 13th.

Mr. Close applied for provisional sentence on a mortgage bond for £200, with interest from December 28, 1893, and for the property specially hypothecated to be declared executable.

Application granted.

COLONIAL ORPHAN CHAMBER V. D. J. BLOM.

Mr. Tredgold applied for provisional sentence for £41 12s. the amount of interest due at the rate of 6 per cent. on a mortgage bond for £750 passed by defendant in favour of the plaintiff.

Provisional sentence granted.

WAIT V. VAN ROOYEN.

Mr. Benjamin applied for provisional sentence on a mortgage bond for £50, with interest at the rate of 8 per cent. per annum from April 1, 1886, the property specially hypothecated to be declared executable.

Order granted as prayed.

STEENKAMP V. W. J. VAN WYK.

Mr. Molteno applied for the provisional order of the court of March 9, returnable on the present date, to be declared final.

Order granted.

LE SUEUR V. MARAIS.

Mr. Smuts applied for provisional sentence on a mortgage bond for £1,000, together with interest at the rate of 6 per cent. from February 22, 1895, the property specially hypothecated to be declared executable.

Application granted.

HEINEMANN V. BARNES. { 1896. April 13th.

Provisional sentence—Acknowledgment of debt—Liquid document—Balance of account—Costs.

Where provisional sentence was prayed on a document in terms of which periodical instalments had been paid, the dates and total amount of which were not given, so that the balance due could not be readily ascertained, though there clearly was an overcharge by plaintiff,

The Court held *that though the document was a liquid document, the matter was, under the circumstances of the case, one of account between the parties and refused provisional sentence, ordering costs to be costs in the cause.*

This was an application for provisional sentence upon a document which read thus:

Cape Town,
25th June, 1891.

I, the undersigned C. W. Barnes, do hereby acknowledge to be indebted to J. H. Heinemann, or order, in the sum of £750 sterling, with interest thereon at the rate of 6 per cent. per annum, which I undertake to pay in weekly instalments of £6. . . . In the event of my failing to pay the instalments punctually . . . the said Heinemann shall be fully authorised . . . to claim . . . the whole amount or any remaining balance unpaid . . which I agree . . to pay on demand should the said Heinemann require me to do so in the event of my failing to pay the instalments as aforesaid.

And I further agree that in the event of any amount being paid to my credit on account of furniture sold on my account, that such amount shall go in reduction of the capital sum due by me . . . but any such credit so made . . . shall not interfere in any way with the due payment week by week of the instalments to be paid by me.

C. W. BARNES.

Mr. Innes, Q.C., for plaintiff.
Mr. Searle, Q.C., for defendant.

The plaintiff in his summons claimed £115 14s. 2d., being the balance due out of the above-mentioned sum of £750.

Defendant in his opposing affidavit alleged that the account rendered by plaintiff is not correct; that the true balance is £11, which he has tendered with costs to date, the offer being refused; that he has always been willing to debate accounts with plaintiff but that the latter has refused, and that the document is not a liquid one.

The plaintiff in his replying affidavit stated that the tender of £11 was made without prejudice, and that no offer to debate accounts has been refused.

Mr. Searle, for defendant, said: The form of the agreement is peculiar, besides the account is wrong. Defendant is willing to debate accounts, but this should be done by action. He contends that on the total £11 only is due. There is indeed an acknowledged liability, but the same document refers to other accounts for which it is not proper to sue provisionally.

Mr. Innes, for plaintiff, said: The document contains nothing that makes it illiquid. The fact of instalments being payable does not take away the liquidity. The Court has often given judgment on bonds for sums due, and *to be due*: provided there is a fixed sum acknowledged to be due.

The Chief Justice said that the document was a liquid document, but it was quite clear that the case was a matter of account between the parties. The defendant made payments from time to time, but the dates on which the payments were made were not given. He found also from the account rendered that the plaintiff had charged compound interest, which could not be allowed in the absence of a special agreement. It was impossible at that time to readily discover how much was overcharged on that account, but there had been an overcharge. Provisional sentence would not be granted. The costs in that application would be costs in the cause when the matter came again before the Court for settlement in an action.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Reid & Nephew; Defendant's Attorney, Gus. Trollip.]

REHABILITATIONS. } 1896.
} April 13th.

The following rehabilitations were granted:

George Augustus Barnes, on application of Mr Buchanan.

Kamardien Behardien, on application of Mr. Smuts.

Johannes Michael Latsky, on application of Mr. Benjamin.

Christoffel Johannes Andries van der Merwe, on application of Mr. Buchanan.

The estate of John Isaac Wells was released from sequestration on the application of Mr. Watermeyer.

The application of Mr. Close for the rehabilitation of Lewis Petrus van Wyk was postponed to enable counsel to consult the records in the Master's Office.

Rehabilitation granted on 16th April, 1896.

GENERAL MOTIONS.

VAN DEN HEEVER V. KRUGER. } 1896. April 13th.

Attachment *ad fundandam jurisdictionem*—Relative value of property attached.

Where in an application for attachment ad fundandam jurisdictionem, *attachment of property valued at* £2,000 *was prayed, the amount in dispute being only* £21, the Court *ordered attachment of a portion only of the property.*

Mr. Smuts applied for the attachment *ad fundandam jurisdictionem* of this Court of certain portions of the farm Tweefontein in the district of Albert, and certain lots of ground in the town of Burghersdorp, in an action about to be instituted by the petitioner by edictal citation against Nicholas Kruger and Jacob P. Kruger for the recovery of a sum of £21 due for services rendered and money advanced.

The Chief Justice said: I have some doubt as to whether there should be a rule of attachment for this small sum of £21. It may be of some importance to applicant, no doubt, to have some means of asserting his right of obtaining this money. The Court, therefore, will order the attachment, *ad fundandam jurisdictionem* of a small portion of this property—one erf only. I am, however, at a loss to account for this application. The applicant is an attorney of the Supreme Court, and it therefore seems to me a monstrous application to apply for the attachment of a large farm and two erven—worth together over £2,000—for such a small debt. The property is mortgaged, it is true, but there is still a large balance for the purpose of paying such a small sum. The fact that such an application was made makes one rather inclined to refuse the order, but I suppose we must not take that into consideration. We will grant the order for the attachment of erf No. 92, and grant leave to sue the defendants by edictal citation, personal service to be effected, and the summons to be returnable on the first day of next term.

[Applicant's Attorney, G. M. Walker.]

Ex parte JOHN P. WILDREDGE.

This was an application to make absolute the rule *nisi* for registration in the name of petitioner of the remaining extent of the farm Nooitgedacht, situate in East Griqualand, he having purchased an undefined half-share of the said farm at a sale in execution, and having since then come to an arrangement to take over a defined portion agreed upon.

Mr. Watermeyer for the applicant.

Mr. Benjamin to oppose on behalf of persons interested.

Case postponed until May 14.

In re EAST LONDON MUTUAL HALL COMPANY.

Mr. Molteno applied for an order placing the said company under operation of the winding-up clauses of the Companies Act of 1892, and appointing official liquidators with power to deal with the assets and accounts.

The Court granted the order for the winding-up of the company and appointed Amelius Vincent and James Hewit Paley as official liquidators, with powers under the 149th section of the Act, security to be given to the extent of £2,000 to the satisfaction of the Resident Magistrate of East London.

IN THE MATTER OF THE MINORS LOTTER.

Mr. Jones applied for authority to the father of the said minors to sell certain one-sixth share of the farm Wittedrift, situated in the district of Piquetberg, which will devolve upon them at the death of their parents, a good price being offered for the same and it being for their benefit that it should be accepted.

Order granted, costs of the application to come out of the estate.

MALAN V. MALAN.

Mr. Schreiner, Q.C., applied to make absolute the rule *nisi* for an interdict restraining the respondent from selling or in any way alienating certain furniture, his property, now in the custody of Isaac Roux, of Paarl, and certain ten shares in the Paarl Berg Wine and Brandy Company, pending the decision of the suit for divorce instituted by applicant against her husband, the said respondent.

Granted.

In re ESTATE OF ALING. } 1896. April 13th.

Executor dative—Appointment set aside—Improper conduct—Costs.

A. *was appointed executor dative in the estates of* H. *and* F.

Upon M. *giving notice of his intention to apply to the Supreme Court for an order*

joining himself with the respondent as co-executor, A. *wrote to* M. *a scurrilous and abusive letter.*

The Court *set aside the appointment of* A. *and appointed an independent third person as executor in the estate, ordering costs to come out of the estate.*

This was an application for an order requiring the Master of the Supreme Court to appoint George L. Meiring and Pieter H. Aling as joint executors dative of the estates of Hester Anna Aling (born Meiring) and Frederick Johannes Aling, it being desired by several of those concerned that the said trust should not devolve upon a single executor.

Mr. Innes, Q.C., appeared for the applicant, Mr. G. L. Meiring.

Mr. Smuts appeared for the respondent, Mr. P. H. Aling.

Applicant's affidavit set forth that he was married in community of property to Alida Johanna Aling, one of the daughters of the late Hester Anna Aling (born Meiring), who died in November. 1885.

That by the will of the said Hester Aling, a sum of £500 was specially set aside for the maintenance and support of her son, Frederick James Aling, who was subject to fits and who was totally unable to manage his own affairs, and the late Robert Nicolaas Aling was appointed the executor to administer the said moneys, which by consent of heirs remained in the hands and administration of the General Estate and Orphan Chamber, the executors of the said Robert N. Aling.

That the said Frederick Johannes Aling died on 31st January, 1896, whereupon the Master convened a meeting of the next-of-kin in the estates of both Hester and Frederick Aling, which meeting took place before the Resident Magistrate of Stellenbosch on the 4th March, 1896.

That deponent appeared for several of the next-of-kin, as will appear from the minutes of the said meeting, to which he craves leave to refer, and the respondent appeared for several others of the next-of-kin. Deponent and respondent each proposed himself as executor dative, whereupon deponent proposed that there should be a joint appointment, but respondent insisted on a sole appointment and the Resident Magistrate decided to forward the papers for the Master to deal with.

That deponent is informed that the Master is of opinion that under the provisions of the Ordinance the said respondent has a preferent claim, but that he is* prepared to suspend issuing the appointment until the matter can be submitted to this Honourable Court.

That deponent desires the administration in the interest of his wife and several of the female heirs, and at their special instance and urgent request.

That the said respondent is not a fit and proper person to administer the said estates, and that for the sake of his family deponent is reluctant to expose the respondent's past conduct and behaviour, but he feels that he will be failing in his duty if he did not oppose the appointment of the respondent as sole executor.

That as far as deponent is concerned he is quite willing to consent, if it is in the power of the Court, to the appointment of the General Estate and Orphan Chamber as executor in both estates.

That since the meeting deponent has been placed in possession of two further votes.

The respondent in his affidavit set forth that he is a son of the late Hester Anna Aling abovementioned.

That he is a notary public and enrolled agent in the Court of the Resident Magistrate of Stellenbosch.

That during the last nineteen years deponent has frequently liquidated and managed estates of deceased and insolvent persons, and thus has frequently had to handle large sums of money, but no complaint has ever been brought against him of incompetence or irregularity.

That the applicant George Meiring is a land surveyor, and that his duties as such necessitate his being absent from Stellenbosch very frequently, which would be a bar to the proper and speedy liquidation of the estates if joined with deponent as executor dative.

That deponent has already signed the security bond (together with the sureties approved of by the Resident Magistrate, Stellenbosch) for £2,300.

That the imputation which the applicant in his affidavit seeks to cast on deponent's character, is entirely false, malicious, and without foundation and it is a gross libel.

The respondent annexed to his affidavit a certificate signed by influential men at Stellenbosch, as to his good name and character.

The applicant in his replying affidavit set forth that about twenty years ago the respondent was secretary of a Divisional Council, that a large deficiency in the chest was found to exist, in consequence of which respondent

* The appointment was definitely made by the Master. REP.

was dismissed from his office and deponent was called upon as surety to (and did) make good the deficiency, that the estates can be administered in a very short while, that he is prepared to stay at Stellenbosch for the necessary time.

To this affidavit the applicant annexed a letter received from respondent after notice of the motion was served on respondent. The letter was couched in grossly scurrilous terms, and to it was added a postscript, "I would feel greatly obliged by your filing this letter with your other detestable papers in the Supreme Court. . . . Don't forget to file this letter with your other notorious papers in the Supreme Court."

The respondent in an affidavit alleged that at the time of the alleged deficiency there was no bank in the town and that he had no safe in his office, and that one morning he found his office broken open and a quantity of cash belonging to himself and the Divisional Council missing, and that he resigned as that Council refused to supply him with a safe, and that he himself repaid the money lost.

Mr. Innes, Q.C., for applicant.

Mr. Smuts for respondent.

The Chief Justice said: I am not prepared to say that the Master in appointing the respondent appointed an unfit person upon the information before him. He was quite justified, I think, in appointing the respondent as executor dative of this estate. But the application made to him by the present applicant appears to me to have been a reasonable one. There was nothing said by the applicant in his affidavits which might in any sense be called detestable, and yet the respondent wrote him a letter—after receiving notice of the motion—which is as scurrilous in its terms as any letter which has ever appeared in this court. It is a letter to a brother-in-law, and is in terms perfectly disgraceful. Any person who could write such a letter and request the applicant to file it with the rest of the proceedings and place them before the Court must be said to be utterly unfit to take upon himself the responsible duties of an executor. He evidently lost his head completely. It is really a scurrilous letter, and I am satisfied that a man who could write such a letter to a brother-in-law after receiving that notice of motion, is utterly unfitted for the appointment, independent of the other charges made against him. It is quite true that what was mentioned there happened twenty years ago, but this applicant was made responsible for the moneys which respondent could not pay. I think, therefore, that it is far better that now, in the interests of the whole family, some independent person should be appointed, and we think that Mr. Currey, as secretary of the General Estate and Orphan Chamber, would be a fit and proper person to be appointed as the sole executor dative. I don't think Mr. Meiring should be appointed, because the relations between him and the respondent are too strained for him to perform his duties properly. As Meiring has not succeeded upon the original notice of motion and upon the original facts, it would be unfair to make the respondent Aling pay all the costs. But as Meiring has succeeded to a certain extent, in that we do not confirm the appointment by the Master of Aling as executor, neither should he be expected to pay the whole of the costs. It appears to be a family feud—some of the family having taken the part of the applicant and some of the respondent. The family are all heirs of the deceased, and upon the whole, perhaps, it would be the best distribution of the costs to order them to come out of the estate. The Court will therefore set aside the appointment of Aling as executor dative and appoint Mr. Currey in his capacity as secretary of the General Estate and Orphan Chamber, and order the costs to come out of the estate.

Their lordships concurred.

[Applicant's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Reitz & Herold.]

VAN WYK V. REGISTRAR OF DEEDS. { 1896. April 13th.

Transfer duty—Exemption—Act 5 of 1884—Heirs—Descendants.

Where immovable property in the estate of a deceased person is proposed to be transferred to all his heirs, being his descendants, each heir is entitled to exemption from transfer duty, under the 2nd and 3rd subsections of the 19th section of Act 5 of 1884, to the extent of his ab intestato *share in the property so to be transferred to all.*

This was an application for an order requiring the respondent to pass transfer to petitioners of their shares of the farms Zand Kraal, Marthinus Kloof, and Delange Kloof, situate in the district of Riversdale, (bequeathed to them by the will of their father) without payment of transfer duty on three-fourths of the value of the property so acquired by them.

The petition of the applicants, Adrian François van Wyk and Wessel François van Wyk, set forth:

That petitioners are sons of the late J. W. van Wyk, of Riversdale, and are executors of his estate.

That petitioners, with Engela van Wyk and the minor Elizabeth van Wyk were the only children of the said late J. W. van Wyk.

That at the date of his death, the said J. W. van Wyk possessed landed property in Riversdale division, and in terms of his will the properties were bequeathed to his four children.

That petitioners as executors caused the transfers of the said landed properties to the said four heirs to be lodged with the Registrar of Deeds for registration, but he refuses to enregister the same unless the said heirs first pay transfer duty on three-quarters of the value of the quarter share acquired by each of them.

That petitioners believe that on the 3rd August, 1865, this Honourable Court decided that under similar circumstances to the above, the said heirs would by law be exempt from the payment of transfer duty, and that the said decision has been acted on and accepted as binding on the Registrar of Deeds until the beginning of this year.

Wherefore the petitioners pray for an order on the Registrar of Deeds, to enregister the said heirs as the owners of the property above described without payment of transfer duty.

The Registrar of Deeds reported on this matter as follows:

I have refused, in consequence of the opinion expressed by the Honourable the Chief Justice in the case of *Nolte* v. *The Registrar of Deeds*. decided on the 7th March, 1895, to pass transfers in this matter until transfer duty is paid by each legatee on the value of the share acquired by him or her, less such amount as represents his or her share considered as heir *ab intestato* in the value of the property acquired by them respectively. In view of the decision referred to I hold that as the value of property is £1,312 8s. the value of the share acquired by each child is £328 2s. and therefore as there are four heirs they are each exempt on quarter of the latter amount, or £82 0s. 6d.

There was annexed to the petition an affidavit by Mr. Henry Knight Tredgold in the following terms:

That I was admitted to practise as a conveyancer in 1859, and have practised as such since 1861, and that from the year last mentioned until within a few months ago, *i.e.*, for a period of quite thirty-four years, transfer duty has never been claimed by the Government, or the Registrar of Deeds, in cases similar to that mentioned in the said petition, to the best of my knowledge and belief.

Mr. Searle appeared for the applicants. He said that the practice in the Deeds Office has always been uniform, viz., not to charge transfer duty in cases like this. See **Bouwer's Case*, (2 Sheil, 60), and †*Nolte* v. *Registrar of Deeds* (5 Sheil, 105).

The Chief Justice said: Where there is only one descendant of a deceased person no difficulty can arise in the construction of the 2nd and 3rd sub-sections of section 19, Act 5 of 1884. Whether all the immovable property in the estate or only a part thereof is to be transferred to him, he is equally exempted from the payment of transfer duty, because, if the deceased had died intestate, such descendant's share in the property to be transferred would have been the whole. Where there are more descendants than one the construction is not quite so simple. The exemption allowed by the two sub-sections applies only to so much of the property as represents the share of the proposed transferee, "in the property so to be transferred," and he cannot therefore, as an individual heir, claim that the exemption shall include his share in the whole of the immovable property of the deceased. Accordingly it was held in *In re Bouwer's Estate* (2 Sheil, 60; 9 Juta, 325), that where transfer is to be made to two out of three descendants, being heirs of the deceased, by virtue of specific and separate legacies, each legatee is only entitled to claim exemption in respect of one-third of the property to be transferred to him and not of all the immovable property of the deceased. The same principle was upheld in the case of *Nolte* v. *Registrar of Deeds* (5 Sheil, 105; 12 Juta, 82.) The Court has now to deal with a case in which it is proposed to transfer immovable property in an estate to all the heirs being descendants of the deceased. In such a case the heirs as a body are entitled to exemption in respect of that property in the same way as a single heir, if there had been only one, would have been entitled to such exemption. Every individual, of that body, ought in principle to have the benefit of the fact that the property is to be transferred to the heirs as a body, provided only that his exemption does not extend beyond his share in the whole of the property so to be transferred. Each heir therefore is entitled to exemption from transfer duty to the extent of his share in the property "purchased or taken over," in terms of the second sub-section, by the

*9 Juta, 325. †12 Juta, 82.

heirs as a body, or "to be transferred," in terms of the third section, to the heirs as a body. In the case of *Esterhuysen's Executors* v. *Registrar of Deeds* (5 Searle, 124), it was held that where immovable property in the estate of a deceased person is divided among all his heirs, being his descendants, each heir is entitled to exemption to the extent of his *ab intestato* portion, even although it is proposed to give transfer of a separate and subdivided share to each. "In accordance with legal principle," said Watermeyer J., "these five heirs taking the entire succession are one, and therefore the whole immovable property goes to the five as if they were one—as a whole, so that each heir of the five has an undivided fifth share in all the seven farms." In the present case the farms in question are proposed to be transferred to all the testators' descendants, and each is therefore entitled to exemption to the extent of his *ab intestato* share in those farms, and the application must be granted accordingly.

Their lordships concurred.

[Applicants' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

LINDLEY AND WOOD V. GEDYE, HENRY, AND OTHERS. } 1896. April 13th.

Sale—Syndicate shares—Cession of action.

S., *who was entitled to three shares in a Nitrate Syndicate, sold to* L. *a quarter of his interest therein and gave a written cession in favour of* L., *and also notified the Secretary to the Syndicate. Subsequently by* S.'s *authority the Secretary, on the issue of the share certificates, indorsed on share certificate No.* 13 (*one of the three Syndicate share certificates issued to* S) *a note that it was issued subject to the cession of the one-fourth interest.*

After the sale to L., S. *sold to* G. *and others a large number of shares in the Company to be floated by the Syndicate, and considerably oversold his interest.*

On the application of G. *the liquidator of the Syndicate was interdicted from parting with cash and shares in the company floated due for distribution on share certificate No.* 13 *and then in his hands.*

On a subsequent application by L., *however, disclosing the above facts,*

The Court ordered *the interdict to be set aside, so far as concerned the cash and three-quarters of the shares, on the ground that at the date of cession to* L. *all that could be done to complete the cession was done, and that* L.'s *claim was therefore preferent to that of* G.

This was an application by James Bryant Lindley and John William Wood, formerly carrying on business in partnership under the style of Lindley & Wood, upon notice of motion to Edwin H. Gedye, Thomas Dodds Henry, Isidore Hirsch, William George Millar, and Harry Gibson in his capacity as Secretary of the South African Association, and as such representing the liquidators of the South African Nitrate Syndicate (Limited).

On the 12th day of March last, two of the present respondents, viz. Edwin H. Gedye and Thomas Dodds Henry, obtained an order from the Supreme Court interdicting Mr. Henry Gibson in his capacity as above from issuing to Alfred Viner Solomon certain shares in the South African Saltpetre Fields (Limited), which among others, as one of the liquidators of the syndicate, Mr. Gibson held for the purpose of distributing to the syndicate members.

In his petition in the application of the 12th March, Mr. E. H. Gedye had stated that on 3rd November, 1893, he acquired from Alfred Viner Solomon 750 shares in the South African Saltpetre (Limited), and gave petitioner an order for the said shares on the secretary of the South African Nitrate Syndicate.

That the said shares were apportioned thus: 500 to petitioner and 250 to his wife, Amy Gedye.

That the order was forwarded to the secretary of the said syndicate for registration but he informed petitioner that this could not be effected, and that therefore petitioner has no security for the delivery of the said scrip purchased from Solomon.

That on the 14th January, 1895, petitioner acquired from William Crosby of Cradock 250 shares in the South African Saltpetre Fields (Limited), the seller ceding to petitioner an order dated 6th November, 1893, by the said Solomon on the said secretary of the South African Nitrate Syndicate, to whom this order also was forwarded for registration with the same result.

There was a petition by Mr. Thomas Dodds Henry, in similar terms, relative to his claim to 500 shares brought from Solomon on the 3rd November, 1893.

The Court granted an order that the said Henry Gibson be interdicted in his capacity as secretary of the South African Association

from parting with the said shares pending the further order of Court, with leave to Solomon or Gibson to apply to the Court to set it aside.

The present application was made to get the interdict set aside.

Mr. Innes, Q.C., for the applicants.

Mr. Schreiner, Q.C., for the respondents Gedye and Henry.

The other respondents (Hirsch and Miller) did not oppose the application, and no appearance on their behalf was made.

The applicant Lindley stated in his affidavit:

That he and John William Wood formerly carried on business under the style of Lindley & Wood, but that the partnership has been dissolved and he has been appointed liquidator thereof.

That between September, 1892, and December, 1893, Alfred Viner Solomon was employed as the agent of the firm, but that while securing certain concessions over nitrate-bearing farms in Prieska he neglected the firm's business and used the money supplied and the horses that had been lent him by the firm, and during that time one of the horses died.

That on deponent remonstrating, Solomon acknowledged that he had acted improperly, and that the firm were really entitled to an interest in the rights obtained by him, and that he would therefore make over to the firm part of the interest which he held in the South African Nitrate Syndicate formed to exploit these rights.

That Solomon thereafter agreed to make over to the firm one quarter of his interest (viz., of three shares) in the syndicate on settlement of the firm's claim against him, and that on 26th October, 1893, he executed a cession accordingly in the following terms:

"I, Alfred Viner Solomon, in consideration of £1, and for other valuable considerations do hereby cede and transfer to Messrs. Lindley & Wood quarter of any interest I may acquire, and which I have acquired in the South African Nitrate Syndicate."

That the firm forwarded this cession to Alfred H. McLeod, the secretary of the Syndicate, who made a note on it to the effect that the cession had been endorsed upon certificate No. 13 of the share issued to the said Alfred V. Solomon.

That deponent requested Solomon and the secretary to endorse the quarter interest on each of the three shares, but was informed that he was sufficiently protected, three-quarters of one share being equal to one quarter of three shares.

That deponent to render certain the precise interest of the firm obtained from Solomon a letter on the 18th June, 1895, addressed to the secretary of the syndicate, stating that the firm was entitled to three-quarters of one share and instructing him to pay to the firm the cash to be received and shares to be allotted on three-quarters of one share.

That the syndicate rights were disposed of to the South African Saltpetre Fields (Limited), and the syndicate is now in liquidation and that the liquidators hold, in respect of share 13, shares in the company to the amount of £3,620 and cash, and that Henry Gibson is the agent and representative of the said liquidators.

That on 12th March, application to this Court was made by Thomas Henry, Edwin Gedye, Isidore Hirsch, and W. G. Millar. Messrs. Henry and Gedye, basing their applications on certain sales of shares made to them in November, 1893, by the said Solomon, claimed the shares in the South African Saltpetre Fields (Limited), which were to be distributed upon the holding of Solomon in the South African Nitrate Syndicate (Limited), Messrs. Hirsch and Millar applied as ordinary creditors for the attachment of the said Solomon's interest to found jurisdiction in an action to be instituted, and an interdict in restraint of alienation was granted.

That the South African Saltpetre Fields (Limited) was not registered at the date of the alleged sales in November, 1893.

That A. H. McLeod produced a power to the said Gibson in term of which it was clear that the said Solomon admitted that he had disposed of three-quarters of his interest to deponents' firm.

Mr. Innes, for the applicants, said that the affidavits showed that on the 26th October 1893, the applicants obtained quarter of Solomon's *rights* in the original South African Nitrate Syndicate: whereas Messrs. Henry and Gedye did not till the 3rd November, 1893, obtain their interest, and then only to *shares* in the company to be floated. The secretary therefore properly registered Lindley's claim and refused to register Gedye's: the company was not floated till March, 1895.

The recognition and endorsement by the secretary of three-quarters interest on the one share was intended to and did effect complete cession to secure Lindley's right, Cf. * *Wright* v. *Colonial Government* (1 Sheil, 216) and *McGregor's* †*Trustees* v. *Silberbauer* (1 Sheil, 337). The shares therefore belonged thereafter to the purchaser and full dominium vested in Lindley. The remedy for Gedye is a personal action against Solomon. The power granted to

*8 Juta, 260. †9 Juta, 36.

McLeod is significant: as it only refers to quarter of this share the fair presumption is that he looked on the remaining three-quarters as not being his.

Mr. Schreiner, for the respondents, said that the point is—can Lindley make good his claim against a *specific* portion of Solomon's interest? It is common cause that Solomon had oversold. We contend that all the shares which are the outcome of his interest must be pooled and all the claims on the interest abate *pro rata*. On the law and facts the applicant is right: we differ as to the application of the law. Both sides are in the position of persons neither of whom have got complete cession: though of course respondent can claim only on the *shares*, not on the cash.

The Chief Justice said: On October 26, 1893, Solomon sold a quarter of his interest in the South African Nitrate Syndicate to the applicants. The terms of the cession are these: "I, Alfred Viner Solomon, in consideration of £1 and other valuable consideration, do hereby cede and transfer to Messrs. Lindley & Woods one-fourth of any interest I may acquire, or which I have acquired in the South African Nitrate Syndicate." On November 3 following, Alfred Viner Solomon sold to the respondents 1,250 shares, not in the original syndicate, but apparently in a company which was to be formed by the original syndicate, and a letter was written to Mr. McLeod, secretary of the syndicate, in the following terms: "Please allot out of the shares due to me in the above-named syndicate as under: T. D. Hoole, Cradock, 500 shares; Mr. Gedye, Cradock, 500 shares; Amy Gedye, Cradock, 250 shares. But there were also 250 other shares disposed of, and we will take it therefore that there were 1,500 shares sold of the scrip to be issued by the new company. It appears to me that on October 26, 1893, Solomon had done all that he could do to pass effectual transfer of his rights. No document had yet been issued in his favour, and he therefore simply gave a letter to the applicants, which letter was sent to the secretary of the syndicate, and the secretary on April 26, 1894, made the endorsement of cession upon certificate No. 13 of the same date issued to Mr. A. V. Solomon. On referring to this document —certificate No. 13—we find that it is a certificate that Mr. A. V. Solomon is the owner and proprietor of one share, No. 13, endorsed on which is the following endorsement by the secretary: "This share is issued subject to the cession of October 26, 1893, by A. V. Solomon to Lindley and Wood of one-quarter interest held by the said A. V. Solomon in the said Nitrate Syndicate." Not one-fourth interest in one share, but one-fourth interest in the syndicate. It appears to me that in order to ascertain the right of the applicants we must read these documents together. Everything that had to be done to pass complete transfer, in my opinion, was done, or all that could be done. The terms of the endorsement are very strong—the share was issued subject to the cession. There was therefore recognition that that cession remained in force. In my opinion this subsequent allotment made to the respondents could not affect the rights which had already been acquired by the applicants. The applicants had been strengthened and fortified, and their claim made valid so far as it possibly could be before the second cession. The cession of October 26 being perfectly good and valid, the cession of November 3 could not affect it, inasmuch as prior to the latter date everything was done by Solomon that was necessary for the purpose of completing the first transfer. I am of opinion that the first transfer should avail, and moreover that the rights the respondents have acquired in respect of the scrip in the subsequent company are subject to any rights acquired in respect to the syndicate by the applicants. That is to say, the rights of the applicants are prior to the rights of the respondents with respect to the shares to be issued by that syndicate. I am of opinion that the interdict should be discharged so far as the cash and three-fourths of the said shares are concerned. But it must be clearly understood that the Court does not decide that Mr. Gibson is bound to hand over these shares to the applicants; because Mr. Solomon is not before the Court. There is *prima facie* ground that this interdict should not stand against the applicants, but the rights have still to be decided in an action to be brought.

Mr. Justice Buchanan said that at the time of the cession to the applicants on October 26, 1893, apparently the certificates of shares in the syndicate were not in existence, but on the very date of the certificates of the syndicate shares being signed—namely, April 26, 1894—the certificate is endorsed to the effect that it is issued subject to cession.

Mr. Justice Maasdorp concurred.

The Chief Justice: The order is granted as prayed, with the costs of opposition against the two respondents who have appeared.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

GENERAL MOTIONS.

ESTATE OF ANDREW MELASS. { 1896. April 14th.

Intestacy — *Curator ad litem et bonis* — Ordinance 104, section 19.

Where A. died intestate and it was necessary that proceedings for arrest of a debtor in the estate should be taken at once without waiting for the appointment of an executor dative,

The Court *directed that the appointment of a* curator bonis *should be made by the Master in the usual way under section* 19 *of Ordinance* 104 *of* 1833, *and that such curator should have the power to take the requisite legal proceedings.*

This was an application on the petition of Nathan Lionel Goldschmidt, of Queen's Town, which set forth:

That the late Andrew Melass died on the 9th of April last, leaving no will or other testamentary disposition.

That the only next-of-kin to the deceased now living is a brother, who is believed to be at present somewhere in the South African Republic.

That petitioner is an attorney and notary practising at Queen's Town, and has been a friend and intimately acquainted with the deceased for the last few years, and is moreover well acquainted with the deceased's business and estate.

That it is necessary in order to protect the interests of the next-of-kin aforesaid of the deceased—and of the creditors in his estate, of whom your petitioner is one—that the business carried on by him during his lifetime should be kept going, and that all movables belonging to the estate should be taken care of.

That before his death the deceased instructed Messrs. Webb, Malcolm & Gibbon to commence a suit against one A. D. Wilson, of the South African Republic, should he endeavour to pass through this colony on his way to America.

That proceedings were instituted and are pending by the deceased's said solicitors to arrest the said Wilson, should he pass through the Colony, and it is imperative that no time be lost.

Wherefore your petitioner prays that this Court will appoint a *curator ad litem et bonis* to the said estate pending the appointment of an executor dative.

There was an affidavit by Mr. Webb, attorney-at-law, stating that the business of the deceased Andrew Melass was that of a chemist and ærated water factory.

That there are many customers supplied from the business almost daily, and that his manager is an expert and fully competent person, and that it is essential to continue the business without interruption, and that therefore it is necessary that a *curator bonis* be appointed pending the appointment of an executor dative.

That the deceased had instructed deponent to institute proceedings against A. D. Wilson to recover £48 15s. 4d.

That the said Wilson is about to leave the Colony for good, without paying the said amount, and that proceedings of arrest have therefore been instituted and are pending.

That the said Wilson is reported in the press as about to be leaving by the Dunottar Castle steamship, and if the process against him is not put into execution he will successfully avoid payment. Wherefore it is necessary in the interest of the said estate and of the next-of-kin and creditors that a *curator ad litem* should be appointed by the Court, with leave to be placed on the record as plaintiff against the said Wilson.

That the said Nathan Goldschmidt is a fit person to fill such appointment pending the appointment of an executor dative, and that he is willing to perform the duties and to report to the Master of this Honourable Court.

The creditors of the deceased are few, and it is chiefly in the interests of the next-of-kin that the appointments are sought for.

Mr. Benjamin, for the applicant, said that they were compelled to make the application as the appointment asked for was a necessary one. A *curator bonis* appointed by the Master under section 19 of Ordinance No. 104 of 1833 would not have power to institute the action and take the arrest proceedings. In any case, if the Court directs that the Master should be asked to appoint a *curator bonis*, we ask that he should have full powers to take legal action in regard to this particular debtor Wilson. The matter is one of great urgency, as it is understood that the debtor is leaving to-day by the mail steamer, and the regular course will take some time.

The Chief Justice said: The 19th section of the Ordinance 104 indicates the course to be taken in cases of this kind: "Where necessary or expedient the Master shall appoint a *curator bonis* to take custody and charge of such estate until

letters of administration may be granted to the executors testamentary or the executors dative." That is the course here. The Master must be applied to to make the appointment. But as there may be a doubt as to whether such a curator would have authority to take the required proceedings the Court will now make an order that the person whom the Master may appoint as *curator bonis* shall have authority to take the proceedings.

Their lordships concurred.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

REHABILITATION VAN WYK.

Mr. Close applied, in the case postponed from yesterday, for the rehabilitation of the insolvent Van Wyk. Though the trustee's report was unfavourable, the records of the insolvent's examination showed that he had explained the disappearance of the movables, and the question of having a commission of inquiry into the matter was left by the creditors in the hands of the trustee, who apparently took no further steps.

The Court said that the man had been insolvent for five years. The trustee had not followed up the charges in his report, and on the whole they thought the application might be granted.

VAN DEN HEEVER V. KRUGER.

The return day of the summons in this case was extended until May 21 on the application of Mr. Smuts.

THE PETITION OF EVAN MORDECAI.

Mr. Close applied for leave to sue *in forma pauperis* in an action against the Cape Lime Company for the recovery of damages for breach of contract and seizure of tools and plant belonging to petitioner; the reference to be made to Mr. Watermeyer.

Application granted.

IN THE MATTER OF THE MINOR JACOBUS C. G. KOTZE.

Mr. Molteno applied for authority to the guardian of the said minor to pass a mortgage bond over his share of the farm Rheboksfontein, in the district of Malmesbury, to secure his proportion of the purchase price at which he and his major brothers are about to take over the farm from their father's estate.

The Chief Justice said: I think that in any order which we may make we ought to protect the rights of the brothers-in-law, because if we make an order for the sale of the property the mortgagee will look upon himself as having absolute right to sell this property in the case of the non-payment of the interest; and the purchasers will look upon the estate as unencumbered. The Court will grant a rule calling upon all concerned to show cause on May 1 next why the rule should not be granted—the rule to be served on the brothers-in-law. The rule to become absolute without further application in case none of the brothers-in-law should appear to oppose. Costs to come out of the minor's share.

IN THE ESTATE OF THE LATE DAVID S. DAWSON.

Mr. Molteno applied to make absolute the rule *nisi* issued under "The Titles Registration and Derelict Lands Act" for registration in the name of the said estate of title of certain four lots of ground situate in Port Elizabeth, purchased from J. J. Holdsworth and the estate of the late R. Tee, but never transferred.

Application granted, costs to come out of the purchase price of the property.

IN THE MATTER OF THE MINORS PRETORIUS.

Mr. Smuts applied for authority to the executors of the estate of the late Abraham Pretorius, and the guardian of the said minors, to pass a mortgage bond over the farm Grootvlei, in the district of Steynsburg, to pay certain debts of the estate and to enable the heirs to satisfy the purchase price at which they are entitled to acquire the said property and discharge other costs and expenses.

Order granted in terms of the Master's report.

In re MINORS FITCHET. { 1896. April 14th.

Minor children—Donation by parent—Mortgage of property.

B. *at a time when his assets exceeded his liabilities made a donation of landed property to his minor children, reserving to himself a life interest in the rents and profits accruing therefrom.*

Subsequently B. *sustained considerable reverses in business and a provisional order for the sequestration of his estate was made.* B. *was thereafter sentenced to two months' imprisonment for assault,*

A sum of only £50 being required to prevent the provisional order becoming final, and thus to prevent the parents' life interest in the landed property being sold in insolvency, there being no other means of support, for the children (owing to B.'s *imprisonment),* B. *applied for leave to raise a loan of £500 on security of the landed property of the children.*

The Court *under the special circumstances granted leave, subject to the provisional order of sequestration being discharged and subject to repayment of the loan by* B. *at the rate of £50 per annum.*

The petition of Thomas Fitchet and Harriet Fitchet (born Wallington), of Cradock, set forth:

That petitioners are married in community of property, and lately owned and conducted a hotel and a farriery at Cradock.

That on the 18th January, 1895, at a time when their assets largely exceeded their liabilities, your petitioners, by a deed of donation executed before a notary, gave and granted to their children, begotten and to be begotten of their marriage, certain landed property at Cradock.

That this donation was made subject *inter alia* to the conditions that your petitioners should during life have the entire administration, management, and control of the said properties, with power to receive the rents, profits, or interest that might arise or become payable in respect thereof, to be appropriated toward the maintenance and education of the said children and towards the maintenance and living of your petitioners and family.

That the landed property was duly transferred to your petitioners in trust for their children in terms of the said deed.

That thereafter in February, 1895, your petitioners removed to Bloemfontein, but were most unsuccessful in their hotel business there, and had to sell out in August at great sacrifice and return to Cradock.

That they then in September, 1895, bought back their former hotel for £6,0 0, but that this venture proved equally unsuccessful, and the petitioner Thomas Fitchet having been committed to gaol for two months for assaulting his wife, and fearing further loss from a continuance of the business petitioners sold out again for £5,500, believing that they would be able to pay their creditors in full; but after calling in claims against them they find that they can only pay 15s. in the pound.

That the estate has been placed under provisional sequestration on the petition of Messrs. Hansen & Schrader, of Port Elizabeth, and they have been summoned to appear before the Eastern Districts Court on the 13th prox., to show cause why the estate should not be finally sequestrated.

That all the creditors will consent to the removal of the said provisional order on payment of their claims in full.

That your petitioners will be able to pay all claims if they can raise a loan of £500 on mortgage of the landed property above referred to.

That if the sequestration is proceeded with in the ordinary course it will be prejudicial to the interests of your petitioners, and consequently of their children as well.

Wherefore the petitioners pray that they may be authorised to mortgage the said properties for the said sum of £500, wherewith to pay the deficiency in the estate.

There was an affidavit by Mrs. Harriet Fitchet, stating that on the 4th inst., her husband was sentenced to two months for assault.

That if the provisional order be made final and the life interest of the above petitioners be sold in insolvency, the petitioners will be penniless and homeless, and their children be without means of support.

That if the loan of £500 be authorised the order of sequestration will be discharged, and the rents of the said properties are sufficiently high to leave a substantial surplus after payment of the interest on the £500.

The Master reported as follows:

Having perused this petition I beg to report that I cannot recommend it for favourable consideration, as it would appear that the petitioners now that they find themselves in difficulties expect to reap the benefit of property which they have secured to their minor children.

In connection with my remark I would draw your lordships' attention to the deed of tranfer and paragraph 1 of the conditions of the donation.

In terms of clause 1 of the deed of donation and of the deed of transfer the father reserved "the full control and entire administration of the said property, and the power from time to time to receive the rents, profits, or interests that may arise, accrue, or become payable from time to time in respect of and in connection with the said property hereby transferred and to be appropriated towards the maintenance and education of the said children, and the maintenance and living of himself and his family."

Mr. Searle moved for petitioner, and said that applications of this nature are not much favoured by the Court, and the Master it is true reports on this matter unfavourably. But there are peculiar circumstances in this case. It would really be to the interest of the minors in view of the peculiar nature of the donation.

The Chief Justice: It is a peculiar donation apparently made in anticipation of trouble.

Mr. Searle: The creditors won't compromise.

Mr. Justice Buchanan: The only justification for this application is to treat it as mortgaging the petitioner's life interest rather than as selling property under sequestration.

Mr. Searle: We propose to mortgage for £500. The property is worth far more and is well let, and all creditors would be paid in full.

The Chief Justice said: The Court will make an order, that upon the discharge of the provisional order of sequestration, the petitioners be authorised to pass a mortgage bond for £500 on the property, such bond to contain a clause requiring the petitioners as the mortgagors to pay £50 per annum towards the redemption of the bond. On principle I am not prepared to say that the Master was wrong in declining to allow this to be done when application was made to him, but there are special circumstances in the case which perhaps the Master was not aware of or could not take into consideration.

[Applicant's Attorneys. Messrs. Scanlen & Syfret.]

REGINA v. HOLDER. { 1896. April 14th.

Scab Acts—Transkeian territories—Proclamation 431 of 1893—Quarantine—Licence—Removal of sheep.

H., *a farmer in the Maclear district, removed certain infected sheep, without the Scab Inspector's permission, from one farm to another (both being in the Maclear district) after they had been quarantined on the first farm.*

The licence under which the sheep were quarantined did not contain the name of the farm where the sheep were to be kept.

Held on appeal, *from a conviction by the Resident Magistrate, that H. had committed no offence under the Scab Acts as there was no such mention in the licence as the Act requires of a place where the sheep are to be kept, and from which they are not to be removed,*

This was an appeal from the conviction of the appellant before the Resident Magistrate of Maclear, on the 26th March, 1896.

The appellant is a farmer residing in the Maclear district of Griqualand East. He was summoned by the Scab Inspector of the district.

The summons called upon Thos. Butler Holder, a European farmer in Maclear district, to answer the charge of contravening sections 4 and 9 of Proclamation 431 of 1893, in that upon or about the 5th of March, 1896, and at or near Antelope Park, in the said district, the said Thomas Butler Holder did wrongfully and unlawfully remove or cause to be removed certain fifty sheep (also a flock of 148 sheep) from Antelope Park, in the district of Maclear, where such sheep had been placed in quarantine under the 3rd section of the said proclamation—without having first obtained a permit from the Scab Inspector of the district authorising him to do so.

At the hearing before the Resident Magistrate the attorney for the defendant took exception to the indictment on the ground "that section 9 of the proclamation says "*removing, &c., from the place specified in the licence,*" and that no definite place was mentioned in the licence regarding quarantining of the farm." The exception was overruled, and the prisoner pleaded guilty under protest. He was found guilty and the Resident Magistrate inflicted a fine of £1.

Against this conviction the defendant now appealed.

Mr. Searle, Q.C., for appellant.

Mr. Sheil appeared for the Crown.

The evidence showed that on the 14th March the Scab Inspector for the district of Maclear visited the defendant's farm Antelope Park, and found the sheep infected with scab. He gave defendant a licence for thirty days under section 3 of the Proclamation.

[Section 3 provides that where the inspector finds the sheep infected, the owner of the flock shall forthwith proceed to make proper efforts to cleanse them, and the said owner shall be granted by the inspector a licence to keep such sheep for a specified time for the purpose.

Section 4 provides for the fines to be imposed, where after sheep have been quarantined, the Scab Inspector finds that proper steps have not been taken to disinfect them.]

The Inspector's evidence further showed that he had ordered the defendant to dip these infected sheep, that he subsequently discovered these sheep on the farm Moorlands, also in the Maclear district, to which they had been removed without his issuing a certificate, withdrawing the sheep from quarantine in terms of section 9 of the Proclamation,

[Section 9 reads: No person shall during any period for which a licence under the 3rd section hereof is granted, remove or cause to be removed . . . from the place which may be therein specified all or any of the sheep for which such licence is given except with the written permission of an inspector duly appointed for the area or district wherein such place is situated. . . . .]

The licence granted to Mr. Holder was as follows:

Licence for keeping sheep under sections 5 and 7 of Act 19 of 1886.

District Maclear.

I, certify that one goat and 780 sheep, the property of T. B. Holder, may be kept by him for the purpose of being cleansed.

The above permit to be in force for thirty days:

(Signed) G. W. Batteson, Inspector, 14th February, 1896.

In overruling the exception the Magistrate said: The Court is satisfied that the usual licence was served on the defendant. . . . With regard to defendant's contention that no specified place was mentioned in the licence, the Court considers that the defendant has not been prejudiced by such omission, owing to the fact that the information was afforded in the "order to dip" delivered to the defendant simultaneously with such licence.

Mr. Searle for the appellant argued that the licence issued to defendant was one suitable under the Scab Act of 1888 (No. 33) and not under section 9 of the Proclamation No. 431 of 1893, as no place is required to be or is referred to by its terms. The defendant timeously took the objection, but the Resident Magistrate however overruled the exception, and no defence was raised on the merits as the defendant relied on the exception. Now in view of sections 3 and 9 of the Proclamation the name of the farm must clearly be mentioned in the licence. Under the Scab Act of 1886 (No. 28), section 5, it is no offence to remove sheep from the place mentioned in the licence. Act 33 of 1888 (section 2) constituted this an offence.

The Resident Magistrate in his "reasons" does say that the name "Antelope Park" was inserted, but as a fact this name was only inserted in the order to dip which was issued simultaneously with the licence; but defendant is not charged with any offence as to *dipping*. The only place specified (if at all) in the licence is "the district of Maclear," as the licence is so headed. But the sheep were never removed out of the district. The Transkeian law on this point is not our law. Ours is laid down in Part III., Act 20 of 1894, section 24.

Mr. Sheil for the Crown admitted that no specific place was mentioned in the licence, but argued that substantial justice had been done, and the defendant suffered no prejudice. The licence says "may be kept by him"—surely this means may be kept on his own farm, and the Court will give a reasonable interpretation to support a conviction under a beneficent Act.

Chief Justice: But he may "keep" them while moving them from place to place.

Mr. Sheil: A reasonable construction must be given to the word "kept," and most persons would interpret it as suggested by the Crown. And while penal statutes must indeed be construed strictly, yet this will be less the case where there is only a pecuniary penalty.

The Chief Justice said: The Scab Acts are very stringent in their operation; they impose great restrictions upon the right of people to do as they will with their own, and they also impose heavy penalties upon any contravention of their clauses. It is necessary, therefore, that they should be strictly observed, and that the Court should place a strict interpretation upon the different clauses. The present conviction took place under the 9th section of the Proclamation 431 of 1893, which applies to Griqualand East and the Transkeian Territories, the Scab Acts of 1886 and 1888. The 9th section enacts that: "Any person removing, or causing to be removed, or aiding in the removal from the place which may be specifind in the licence given, all or any of the sheep for which such licence is given, except with the written order of the scab inspector," &c. The appellant was charged with removing certain sheep from a certain farm, named Antelope Park, and this is said to have been done in contravention of the licence given to him by the inspector on February 14, 1896. Now, the licence is as follows: "Licence for keeping sheep under sections 5 and 7 of the Scab Act, 1886"—(It is not under the Act of 1886 at all, but under the Proclamation; however, let that pass)—"District Maclear: One goat, 780 sheep, the property of Mr. J. B. Holder, may be kept by him for the purpose of being cleansed. Above permit to be in force for thirty days." There was nothing in this licence warning him not to remove the sheep from the particular farm on which they might be at the time. There is no place specified except the district, the farm is not specified, but simply district Maclear. If he had removed these sheep from the district of Maclear, there would have been some ground of action that he had removed them from the place specified in the licence. But it is admitted that they were

not removed from the district of Maclear, but removed from one particular farm to another. In my opinion, this is not a contravention of the Act. I suggested at first that possibly the words "may be kept" might apply to the particular farm. But the keeping is only personal to the owner of the sheep, and if the owner removes them from one place to another and still remains in possession of the sheep, he would be keeping them, although it would be a removal in the terms of the Act. For these reasons I am of opinion that the conviction is wrong. There was no removal from the place specified in the licence. The appeal must be allowed and the sentence quashed.

Mr. Justice Buchanan concurred. He said: This error has arisen from the inspector using an old form, and not altering it to suit the requirements of the proclamation under which he acted.

[Appellant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

VAN DEN HEEVER V. A. S. SMIT, JUN. { 1896. May 1st.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £ 04 2s. 11d., together with interest at the rate of 7 per cent. per annum from March 23, 1895, and that the property specially hypothecated be declared executable.

Provisional judgment granted.

PRITCHARD V. FACTOR AND LAX.

Mr. Graham moved for provisional sentence for £25 15s., the amount of a promissory note, now overdue.

Application granted.

PRITCHARD V. AMY H. LAX.

Mr. Graham moved for provisional sentence for £29, the amount of a promissory note, due March 31, 1895.

Provisional sentence granted.

DREYER V. BOTHA. { 1896. May 1st.

Provisional sentence—Promissory note—Novation—Collateral security.

A, *being unable to meet a promissory note on maturity, gave* B. *a cession of a lease of land of which* A *was the lessor.*

B. *received the rents of the farm till the land was sold under a writ of attachment, whereupon* B. *sued* A. *on the promissory note.*

A. *alleged that the cession of the lease was intended to and did effect a novation of the promissory note.*

The Court held *that in view of the terms of the cession there was no such extinction of the original debt as would effect a novation by the substitution of a new contract, and granted provisional sentence.*

Mr. Schreiner, Q.C., applied for provisional sentence on a promissory note for £200 sterling with interest at the rate of 6 per cent. per annum from October 26, 1894, less two sums of £50 and £34 14s. 4d., paid on account.

Mr. Searle for the defendant.

There was an affidavit by Mr. Botha stating *inter alia* that he had signed the promissory note in question.

That he was unable to meet the note at maturity, whereupon plaintiff and defendant agreed that in place and stead of the promissory note the defendant should grant cession of the rent from time to time accruing to defendant as lessor under a lease to one Joachim du Plooy of a certain farm called Hartebeest Hoek.

That on the 12th January, 1895, a cession of the said lease was given by defendant for and in consideration of the debt due by defendant under the promissory note, and was delivered to plaintiff duly executed, together with the original of the said lease upon which the same was indorsed.

That Donald Welsh, defendant's agent, on delivering the said cession of lease to plaintiff, informed him that he must return the promissory note to defendant, and plaintiff promised to do so, but has failed to carry this out.

That the lessee paid two instalments of £50 on the 1st July, 1895, and on the 1st January, 1896, as they became due.

That on the 5th November, 1895, the whole of deponent's landed property including the farm Hartebeest Hoek was sold at public auction under writ of attachment of this Honourable Court.

That at the said sale one Hermanus Stephanus Dreyer, a brother of the plaintiff, became the purchaser of the said farm Hartebeest Hoek he knowing well the existence of the lease and of the cession aforesaid.

That beyond the rent so paid by the lessee no sum of money has at any time been paid by or on behalf of deponent in respect of deponent's indebtedness to plaintiff.

That from the fact of the plaintiff crediting deponent in the action with the amounts so received as rent and of his suing on the promissory note and ignoring the said cession, it is evident that in instituting the present proceedings the plaintiff and the said Hermanus Stephanus Dreyer are attempting to avoid the legal consequences to the said Hermanus Stephanus Dreyer of the existence of the said lease of the said farm, and of the said cession of the rent falling due under such lease.

The cession of the lease referred to in the above affidavit was worded as follows:

"I, the undersigned Johannes Hendrik Botha do hereby cede, transfer and set over all my right, title and interest in and to the foregoing contract of lease and hire to and in favour of Mr. Johannes Frederick Dreyer of the farm Bamboosfontein, his heirs, executors or assigns, for and in consideration of the sum of £200 and interest at 6 per cent. per annum reckoned from the 26th October, 1894, which sum I hereby acknowledge to be due and owing by me to the said J. F. Dreyer, upon the conditions however that (1) when the said Dreyer shall have received the necessary amount of rent to recover the above claim or (2) if I shall at any time pay the whole of the said sum, then this lease shall be recalled to me, and provided further, that should the lessee herein mentioned fail to pay the whole or any part of his rent, then I shall be liable to pay any deficiency to the said J. F. Dreyer.—(Signed J. H. Botha.)"

Mr. Welsh in an affidavit stated that the plaintiff requested him to draw up the cession, and that he himself fully understood from the plaintiff that the cession was in lieu of the promissory note, and that the note would be returned to the said defendant, and that the cession was not as security for the payment of the said note.

The plaintiff in his answering affidavit deposed that it was understood at the time that the cession was not in place of the note but as collateral security for the due payment thereof.

That the rents were duly received by him till November, 1895 when the farms were sold, and the purchasers thereafter took the rents themselves.

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Mr. Schreiner said that it was not denied that the case was on a liquid document. But now it is said there was a novation. To effect this there must be proof of a specific intention. See *Ewers* v. *Roberts* (Foord, 32). We have a document signed by them in our favour and they will have to go behind it to prove novation

Mr. Searle: The answer of "no novation" to our objection fails in view of the admissions in their affidavit. Hire goes before sale: *Green* v *Griffiths* (4 Juta, 316). The case of *Ewers* v *Roberts* is not applicable, and we contend that this is not a case for provisional sentence.

Mr. Justice Buchanan, in giving judgment, said: Plaintiff in this case sues on an overdue promissory note. The defendant admits that the amount on the promissory note sued for is due, but he sets up the defence that there was a novation. This novation was alleged to be contained in the cession of a lease. On looking at the cession it is clear from the terms used that the cession is intended to be as collateral security for the promissory note. To be a novation there must be an extinction of the previous contract, and the substitution of a new contract. In this case there is no extinction of the debt. On the contrary, the cession expressly states that the defendant in this suit shall remain liable for the promissory note, notwithstanding the cession. It states that if at any time the whole of the sum due shall be paid out of the rent, then defendant is to receive a recession of the lease, or if the lessee at any time fails to pay the rent defendant shall remain liable to pay the deficiency. It is clear that there is no novation such as to extinguish the previous contract. Incidentally the question was raised as to whether the lease ceded is now void or not in consequence of the judicial sale; but the facts are not sufficiently before the Court for us to decide. In giving provisional sentence on the promissory note, the plaintiff must be prepared to recede the collateral security, the lease, upon payment.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorney, Gus. Trollip.]

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. CHRISTIAN M. OPPERMAN. { 1896, May 1st.

Mr. Sheil, Assistant Law Adviser, moved in terms of the summons for the unpaid balance of property purchased.

Judgment under rule 529d as prayed.

ADMISSIONS.

Ex parte REISS.

Mr. Close applied for the admission of Mr. Fritz Herman Reiss as attorney and notary.

The application was granted and the oath administered.

Ex parte SMITH.

Attorney—Articled Clerk—Practice.

A., *an attorney who was qualified to practise in the superior Courts of Scotland, came to the Colony, and after having served in the Colony under articles for one year applied for admission as an attorney of the Supreme Court.*

The Court *ordered the admission but held, that the proper practice for applicants with similar qualifications is to apply beforehand for leave to serve the year required in the Colony and not to serve the year before making any application to the Court.*

Mr. Close applied for the admission of William Anderson Smith as attorney, notary, and conveyancer.

Mr. Smith was entitled to practise in the superior courts of Scotland, and had served a year in the Colony.

Mr. Searle, Q.C., appeared on behalf of the Law Society, not to oppose the application but to obtain an expression of opinion from the Court as to the necessity of adhering to the Colonial practice, which the society held was that application should be made to the Supreme Court before the term of service for an order to serve for a year, with a view to qualifying for admission in the Colony.

Mr. Justice Buchanan said: The admission will be allowed, but the practice of the Court will be adhered to in future. If intending applicants do not follow this practice in future, they will run the risk of having to serve an extra year in the Colony. The oaths to be taken before the Resident Magistrate of King William's Town.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

GENERAL MOTIONS.

THE PAARL BANK, IN LIQUIDATION. { 1896. May 1st.

Mr. Schreiner, Q.C., applied for the sanction of the Court to the appointment of Mr. V. A. van der Byl as attorney to the official liquidators during the absence from the Colony of Mr. C. C. de Villiers, and for presentation of the third report of the said liquidators.

Application granted.

IN THE MATTER OF THE MINOR BOYD.

Mr. Close applied for authority to the father and natural guardian of the said minor to sell certain lot of ground in Wicht-street, Cape Town, her property, an offer of a suitable price having been made, and it being in the interest of the minor that it be accepted.

Order in terms of the Master's report granted, costs to come out of the proceeds.

COLONIAL GOVERNMENT V. PUDDING MADUMASHE.

Mr. Sheil, Assistant Law Adviser, applied on behalf of the Assistant Treasurer of the Colony, for leave to sue by edictal citation in an action against the respondent for specific performance of a contract respecting the purchase by him of certain land known as lot No. 157, Kabula Valley, in the district of King William's Town, or otherwise for the cancellation of the said sale.

Application granted, summons to be served personally, failing which publication in the "Government Gazette" and "Imvo," summons returnable on the last day of term.

THE PETITION OF SAMUEL LOXTON.

Mr. Molteno applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for transfer to petitioner of certain lot of ground marked No. 6 in the village of Whittlesea, at present registered in the name of the late Frederick Neale, purchased by petitioner from the trustees of the late James Collins, whose estate is unrepresented and unable to give transfer.

Application granted.

WILTSHIRE V. WILTSHIRE.

Mr. Graham applied to make absolute the rule *nisi* for dissolution of the marriege subsisting between the parties, by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and an order giving the custody of the minor child of the marriage to applicant.

Application granted.

AITCHISON V. AITCHISON.

Mr. Benjamin applied for leave to applicant to sue by edictal citation in an action

against respondent, her husband, for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, and for the custody of the minor children.

Order granted, personal service to be effected if possible, failing which one publication in the "Sydney Herald"; returnable on the 1st of August. Leave was also granted to serve the intendit and notice of trial with the citation.

IN THE ESTATE OF THE LATE JAN A. MEYER.

Mr. Buchanan applied for the removal from his trust as executor dative of the said estate of Thomas S. Sheard, by reason of his insolvency, absence from the Colony, and neglect in failing to liquidate the said estate.

Order granted, costs to come out of the estate.

VAN NIEKERK V. FLEISCHER.

Mr. Close applied for a rule *nisi* requiring the respondent to show cause why applicant shall not be admitted to sue him *in forma pauperis* in an action for the recovery of a balance of money alleged to be due in respect of certain trading expeditions.

Application granted.

CROESER V. CROESER.

Mr. Benjamin applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights.

Application granted.

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

REVIEW OF MAGISTRATES' SENTENCES.

REGINA V. GEARY AND CRYSTAL. { 1896. May 4th.

Mr. Justice Maasdorp said that as judge of the week the following cases came before him: Henry Geary and William Crystal were convicted by the Resident Magistrate of Knysna on a charge of public violence by recklessly discharging firearms in and across a public thoroughfare or public place to the bodily fear and danger of passers-by, and to the unlawful disturbance of the public peace and security; also that they entered the dwelling-house of David Hess, in the native location at Millwood, and wrongfully and unlawfully drew and presented a revolver, and threatened to shoot a dog therein, to the bodily fear and danger of the said Hess and others in the house at the time. The evidence in support of the charge seemed to amount to very little. On a certain night, when the accused, Geary, seemed not to have been very sober, he was sitting in his hotel and was disturbed by a dog outside, whereupon he fired through the window at the dog. There was no evidence that anyone was actually in danger by his so shooting, and the fire was not in the direction of any public thoroughfare. There was the evidence of one witness, and that seemed the only serious evidence in the case, which was that his house was 200 yards from the hotel, and that he "sawthe bullet passing—it was red—he could not see the bullet the whole way." That was the only evidence that any bullet flew over the heads of people. This would not amount to public violence as described by *Van der Linden* Institt., 2, 4, 6] for which offence the sentence of death may be passed, as "it frequently originates with the differences of men respecting the government of the State." With reference to the second charge, the evidence is that these two men, not being quite sober, proceeded to the native location and there entered into the house of one of the residents, and whilst sitting there a dog barked under the bed and one friend asked the other if he would not like to shoot it, whereupon the other put his hand on his revolver and then changed his mind and said that he thought he would not. That is the only evidence against them. The conviction must be quashed.

REGINA V. TURNBULL AND OTHERS.

The other case was a judgment of the same Magistrate, and the charge was a similar charge of public violence against four prisoners, Turnbull, Van der Walt, Geary, and Crystal. It seems that they proceeded to the house of a person named Küster, who had been their friend, but who, it seems, had been charged with making libellous statements about one of them. On arriving at the house, the accused Turnbull called out that they wanted to practise with pistols and swords, or swords or fists. Küster said he never fought, and he refused to fight. Turnbull said, "You can't fight, but you can spread false reports." Küster denied it, and then Crystal said, "If you won't fight Turnbull you must

fight me five rounds." Küster refused to fight, and Turnbull said he would fight his own battles. That was all the evidence, and although he (the judge) thought that Küster had every reason to be dissatisfied with the treatment meted out to him, yet the offences might all have been brought under the Police Offences Act, and the convictions must be quashed. The matter was submitted to the Attorney-General, who said he was not prepared to support the convictions.

GENERAL MOTIONS.

VAN NIEKERK V. HUGO'S TRUSTEE. } 1896. May 4th.

Insolvency—Set-off — Trustee's powers—Section 28, Ordinance 6 of 1843—Reduction of claims proved—Section 3, Ordinance 6 of 1843.

H. *hired a farm from* N. *for a year at a rental of* £75, *the rent however to be* £50 *only, should* H. *construct a dam on the farm.* H. *paid* £25 *rent in advance.*

Before the expiry of the year and when the dam was not quite completed H. *became insolvent.* N. *claimed and proved preferently in the insolvent estate for the balance of* £50 *rent.*

L. (*the trustee*) *however, after the claim was proved in the estate, reduced* N.'s *claim for* £50 *by setting off* £18 *for work, labour, and materials spent on the dam and awarded* N. £32 *in the distribution account.*

The Court, *on objection by* N. *to the confirmation of the distribution account, ordered the matter to be returned to the Resident Magistrate to determine the question of set-off.*

This was an application under section 3 of Ordinance No. 6 of 1843 made by Barend Philippus van Niekerk on notice to the respondent J. G. Lindenberg, as sole trustee of the insolvent estate of Hendrik Jacobus Hugo, calling on him to show cause why the plan of distribution in the said estate should not be amended by the award to applicant of the full amount of his preferent debt proved (£50) instead of the amount brought up in the account, viz., £32; also why respondent should not pay costs of the application.

The applicant in his affidavit stated that the insolvent Hugo was lessee of part of his farm Wildebeestevlakte at the time of the said Hugo's insolvency—in March, 1895.

That the rent for the year was £75, of which £25 had been paid in cash, so that the sum of £50 remained due, and that applicant proved for this sum at one of the meetings for this sum.

That respondent has only awarded £32 to applicant in the distribution account of the said estate, but that applicant never agreed to accept the sum of £32 and claims £50 as due and that it should be awarded.

The respondent in his affidavit set forth that in the schedules filed by the insolvent Hugo at the time of his insolvency, the applicant figured as creditor for only £25.

That Hugo had hired the farm from applicant on the 14th May, 1894, for a year to expire on 14th May, 1895, the rent thereof to be £50 should the lessee thereafter construct a dam on the farm at a cost of £25, otherwise the rent to be £75.

That the said Hugo paid £25 as six months' rent in advance and commenced the dam, and that at the time of his insolvency he had nearly completed it at a cost of over £40, besides his work and labour, and that only £7 would be required to finish the work.

That deponent repeatedly offered to the applicant the sum of £32 (being the £25 for the last six months' rent and the £7 to complete the dam), but the applicant refused the amount.

That deponent therefore in framing the account awarded applicant the sum of £32 for these reasons.

Mr. McLachlan said that against the £50 claimed by the applicant the respondent set off the value of the dam as at £25, less the £7 required to complete the dam.

He contended that section 28 of Ordinance 6 of 1843 provides for cases like this. The claim by the insolvent against the applicant in regard to this dam is not liquidated, and the trustee cannot liquidate of his own motion.

Mr. Graham: We are bound to agree to that. It is the Court that strictly must liquidate. The only question is whether it is worth while bringing an action. Probably the trustee wished to bring the matter before the Court as cheaply as possible. The claim by applicant is only £18; the parties may be able to come to an agreement as to the set-off.

Mr. Justice Buchanan said that it was simply a matter of a set-off which must be settled by the Magistrate, under the provisions of section 28 of Ordinance No. 6 of 1843, unless the parties could come to some agreement. The application must stand over *sine die* until the question of set-off had been settled.

[Applicant's Attorney, H. P. du Preez; Respondent's Attorney, S. J. Mostert.]

THE PETITION OF THE CRADOCK BUILDING SOCIETY. } 1896. May 4th.

Transfer — Power-of-Attorney — Sale of mortgage land—Absence of registered owner—Practice.

D. *and* P., *who were the registered proprietors in undivided shares of erven at Cradock and shareholders in the Cradock Building Society, obtained a loan on security of the erven.*

As the mortgagors were in arrear in their payment to the society of the instalments due, the society notified to them that the erven would be sold to meet their indebtedness.

D. *thereupon gave the society a formal special power-of-attorney to sell and transfer the land, but* P. *merely wrote a letter stating that the society could sell the land, and thereafter left the Colony without giving any such formal powers.*

The Court, *under the special circumstances, granted an order upon motion authorising the Registrar of Deeds to pass transfer without having* P.'s *formal power and without further notice to* P.

The petition of Arthur Elvey Austen and Alfred Metcalf, in their capacity as trustees of the Cradock Building Society, set forth:

That your petitioners are the trustees for the time being of the Cradock Building Society.

That Thomas Benjamin Davie and James Peter Peters are the registered proprietors in undivided shares of the erven Nos. 169 and 170 in Frere-street in the town of Cradock.

That the said Thomas Benjamin Davie and James Peter Peters are shareholders in the said Cradock Building Society, and as such obtained advances or appropriations of funds from the said society in terms of the rules thereof, namely: Firstly, the sum of £600 sterling; and secondly, the sum of £200 sterling; for which amounts they passed joint and several bonds in favour of the trustees for the time being of the said society, dated respectively 31st December, 1881, and 13th June, 1882, as will more fully appear on reference to the original bonds hereto annexed.

That the said bonds were passed as mortgages on the aforesaid erven Nos. 169 and 170.

That in terms of the said bonds the said mortgagors were bound to repay the said advances to the said society in quarterly instalments of a tenth share of the capital per annum, together with interest as in the said bonds recited, and should they be in arrear with the payment of the said instalments and interest for a longer period than four months, the said trustees, if instructed thereto by a majority of the directors of the said society, can sell the mortgaged property and pay themselves out of the proceeds, and the said mortgagors in such event appointed the trustees for the time being of the said society as their attorneys irrevocably and *in rem suam* for the purpose of disposing of the said property by sale and passing transfer in customary form of law to the purchaser or purchasers thereof.

That since 1887 neither of the said mortgagors have made any payments of capital or interest on the said bonds, save and except sundry rents collected by the said society from tenants of the said property for account of the mortgagors.

That the said Thomas Benjamin Davie now owes the said society the sum of £313 5s. and the said James Peter Peters owes the said society the sum of £136 19s. 7d., being balance of capital and interest under the said mortgage bonds according to the accounts hereto annexed each being liable for the whole £550 4s. 7d.

That in terms of the said bonds the capital and interest should have been fully and completely paid by the 21st December, 1891, and the 13th June, 1892, respectively.

That the said Thomas Benjamin Davie did by writing, grant a special formal power-of-attorney, dated 3rd February last, empowering your petitioners to sell and pass transfer of his portion of the mortgaged property.

That the said James Peter Peters left Cradock about the year 1887, and has never returned. That for a time he resided at Prieska, and whilst there your petitioner the said Alfred Metcalf, acting as attorney for the said society, wrote him the letter dated 6th October, 1891, copy whereof is annexed, giving him notice that in terms of the said bonds his said property would be sold by the directors. That in reply to that letter your said petitioner received a letter written by the said James Peter Peters, dated 17th October, 1891, intimating that the property must be sold and that he had no money to pay the debt, which letter is hereunto annexed.

That your petitioners have been duly authorised to sell the share of the said James Peter Peters in the said erven, and did on the 7th day of March, 1896, publicly dispose of the same by auction to Elizabeth Holmden, of the town of Cradock, for the sum of £180 10s., the best price to be gotten for the same and in conjunction with the half-share of the said Thomas Benjamin Davie, the two together fetching the sum of £361 sterling.

That prior to the said sale the said property was duly advertised in the "Government Gazette" and in the "Midland News" as for sale on the said 7th day of March, 1896.

That your petitioners annex hereto an appraisement by Albert Ziervogel, sworn appraiser, of Cradock, who values the half-share of the said James Peter Peters at the sum of £100 sterling.

That the directors of the said society have resolved to accept the said proceeds of the half-share of the said James Peter Peters in the said property in full discharge of the society's claim upon him.

That efforts have been made for some time to discover the whereabouts of the said James Peter Peters without success.

The petitioners prayed that the Registrar of Deeds may be authorised to allow transfer and conveyance of the said half-share in the said erven Nos. 169 and 170, Frere-street, Cradock, to pass to and in favour of the said Elizabeth Holmden, of Cradock, under power of substitution from your petitioners, and without a formal power to transfer signed by the registered owners.

There was an affidavit by Mr. George Armstrong, of Cradock, auctioneer, stating that he did upon the 7th day of March, 1896, instructed thereto by the trustees of the Cradock Building Society, offer for sale by public auction after due advertisements the half-share of one James Peter Peters in certain two erven in Frere-street, Cradock, marked Nos. 169 and 170, with the buildings thereon, and that the highest bid obtained for the same was £80, whereas when offered in conjunction with the half-share of Thomas Benjamin Davie the whole realised £361, which this deponent considers a high price.

The following is the letter of the 6th October, 1891, addressed to the mortgagors by Mr. Metcalf:

"Gentlemen,—I am instructed by the directors of the Cradock Building Society to give you notice, that in terms of certain two mortgage bonds for the sums of £600 and £200 respectively and dated respectively 31st December, 1881, and 13th June, 1882, passed by you in favour of the said society, they will cause to be sold at Cradock by public auction, on Saturday the 7th day of November next, the certain two erven marked lots 169 and 170 in Frere-street, Cradock, mortgaged under the said bonds. The amount due to the society under the said bonds and actually in arrear, is £469 16s. 2d. Whatever balance may be due by you to the society after crediting you with the net proceeds of the sale, you will be called upon to pay."

To this letter J. P. Peters replied on the 17th October, 1891: "Yours of 6th October received to-day. The property must be sold, as I have not any money to pay up. I am getting my living by selling ginger beer, and that at times is not very good."

The report of the Registrar of Deeds was as follows:

"This application appears to be a necessary one and I have nothing to urge against its being granted. 22nd April, 1896.—(Signed) B. W. Holland."

Mr. Schreiner for the applicant said that this was a matter of interest in practice. In the case of the *Trustee of the Kimberley Building Society* v. *Hassell*, decided on the 10th March, 1892 [not reported], in Kimberley, the process taken was by edictal citation and intendit. But the point was not raised whether a motion would not do equally well and save great expense. The practice in the Registrar of Deeds' Office here is based on *Grotius, Introd.* II., 48, 41 (p. 192 Maasdorp's Translation). *Schorer*, however (Note 266 on Grotius), seems to show that *Grotius* goes too far and that he is alone in his view. See *Voet* (2), 1, 25 and 26), supporting *Schorer*, as do others. We only ask the Court for a rule as to practice, we don't question the Registrar's decision.

Mr. Justice Buchanan said that no order would be made at present; their lordships would consider the form of order.

Postea (May 4th).

Mr. Justice Buchanan said: We have come to the conclusion that it is unnecessary to give any further notice to the debtor. The debtor gave a power of attorney forbidding the sale, but before the sale was made he was written to that the sale had become necessary, and he wrote back consenting to the sale taking place. The sale was by public auction, and a fair price seems to have been realised. Under these circumstances, and the debtor not being in the Colony and not easily available, we do not think it necessary to give further notice, and the order will be granted.

[Applicant's Attorneys, Messrs. Scanlen & Syfret.]

IN THE MATTER OF THE MINORS VAN JAARSVELDT.

Mr. Watermeyer applied for authority to the mother of the said minors to sub-divide the farm Wolvekloof, in the district of Wodehouse, bequeathed to them by their parents, and sell a portion thereof for the purpose of paying off a mortgage bond and other

debts, and to devote the balance towards the cost of building a house on the remainder for herself and family.

Order granted in terms of the Master's report.

REGINA V. VAN ZYL. { 1896. May 4th.

Resident Magistrate's jurisdiction—Statutes not conferring special jurisdiction—Act 20 of 1856, section 42—Powers of sentence in criminal cases—Killing wild ostriches on Crown land—Act 33 of 1889, sections 3 and 4—Reduction of sentence—Procedure.

A. *was charged before the Resident Magistrate with contravening section 4 of Act 33 of 1889, by killing wild ostriches on unoccupied Crown land without a licence.*

The Resident Magistrate convicted him and sentenced him under Act 33 of 1889, section 3, to pay a fine of £20, or undergo three month's imprisonment, though this Act does not expressly give Resident Magistrates jurisdiction.

Held on appeal, *that in virtue of section 42 of Act 20 of 1856, Resident Magistrates have jurisdiction to try even an offence created by a statute which does not expressly confer jurisdiction on such Resident Magistrates provided that the offence is not punishable by death, transportation or banishment, the Magistrate's powers as to punishment however being limited to the powers conferred by that section.*

The Court *therefore confirmed the conviction, but reduced the fine to £10, leaving, however, the alternative period of imprisonment unaltered. On application on the next Court day, however, the Court proportionately reduced also the alternative sentence of imprisonment.*

This was an appeal from the conviction of the accused by the Resident Magistrate of Namaqualand on a charge of killing a certain wild ostrich on unoccupied Government land without the licence required by Act 33 of 1889.

Mr. Smuts appeared for the appellant.

Mr. Sheil, assistant law adviser, appeared for the Crown.

The grounds of appeal were that the Magistrate had no jurisdiction; that there was not sufficient evidence to prove that Van Zyl shot the ostrich and that the benefit of the doubt should have been given in favour of the accused. and that it was not proved that the ostrich was shot on unoccupied Crown lands.

Mr. Smuts said that appellant was indicted under section 4 of Act 33 of 1889. He should have been indicted under section 3 of the Act. For it cannot be seriously contended that accused shot the ostrich on unoccupied Crown land. Mr. Rich's evidence is clear, showing that where it was shot at and where it was killed was on *leased* Crown land, though it must be admitted that the father of the accused says that it was unoccupied Crown land.

Moreover, the Resident Magistrate assumed jurisdiction and gave sentence for £20 or three months, but the Act of 1889 gave him no such power. As a magistrate is not a creature of common law but of statutory, he is confined strictly to the powers actually given him. It is significant that the Acts of 1875 (No. 15) and of 1870 (No. 12) did expressly give him special jurisdiction, but they have been repealed and the repealing Act gives no jurisdiction. The Resident Magistrate's Court is a statutory one, strictly limited to its statutory powers: *Riversdale D.C.* v. *Pienaar* (3 Juta, 256). The Resident Magistrate should at most have proceeded under section 28 of Ordinance 40 of 1828.

Mr. Sheil argued that the jurisdiction which the Magistrate has is that given him by section 42 of Act 20 of 1856. His sentence is wrong only in so far as it exceeds the powers of punishment there given.

Mr. Justice Buchanan said: The appellant in this case was charged before the Resident Magistrate with contravening section 4 of Act 33 of 1889—the Act for the Protection of Wild Ostriches. He pleaded not guilty, and was found guilty and sentenced to pay a fine of £20, or in default to undergo three months' imprisonment. There were three objections to the judgment. The first was that the Magistrate had no jurisdiction. Act 33 of 1889 fixes the maximum penalty for this offence at £20, or six months' imprisonment. The Act does not say expressly that the Magistrate's or any other Court shall have jurisdiction in this case; but on reference to the Resident Magistrate's Court Act, No. 20 of 1856, it will be seen that jurisdiction is conferred on all magistrates in the Colony in any criminal offence which is not punishable by death, transportation, or banishment from the Colony. This offence is not punishable by any of these punishments, and the magistrate therefore has jurisdiction, as he has in all other offences. But as no extended jurisdiction has been given to the Magistrate his punishment must be limited to the amount

which he is entitled to give under the Resident Magistrate's Court Act, which is £10 or three months' imprisonment. Therefore the sentence as passed cannot stand, and must be reduced to the amount of £10. The second objection is on the grounds of insufficient evidence against the accused. The evidence being read shows that it is clear that the accused pursued and shot this ostrich and killed it, and plucked its feathers. The Magistrate had the witnesses before him and believed those witnesses. That objection cannot therefore stand. The third point of objection is that this offence was committed on land not unoccupied Crown land. Section 3 of Act 33 of 1889 refers to land occupied by private individuals, and section 4 refers to unoccupied Crown lands. The only difference between these sections is that in the case of occupied land a licence to shoot must be obtained from the occupier, and in the other case from the Crown. The sections otherwise are identical. The objection is that the accused was charged under section 4 instead of under section 3. But the objection was not raised in the Court below, and consequently no direct attention was called to the defence that this was not unoccupied Crown land. The Magistrate who tried the case will, however, be acquainted with the place, and in the absence of direct evidence to the contrary, we must assume that he was justified in holding that the offence was committed upon unoccupied Crown land. There was no prejudice to the plaintiff in either case, though of course if a person is charged under a criminal section, the requirements of the section must be met. I think in the case as it now stands it is sufficient for the Court to say that there was evidence to show that this is unoccupied Crown lands. The only objection which is sustained is the first one, and the penalty must therefore be reduced to £10.

Mr. Justice Maasdorp concurred. He said that the only doubt which might have existed in the case was whether the crime was actually committed on unoccupied Crown land, and the Magistrate seems to have been satisfied on that point.

Postea (May 5th).

Mr. Smuts asked leave to mention again the matter of Regina v. Van Zyl, an appeal from the conviction by the Resident Magistrate of Namaqualand. Their lordships had reduced the sentence from £20 or three months to £10 or three months, but he had since heard that Van Zyl had been lying in gaol since conviction. He had been in prison almost a month. As a reduction had been made in the fine, he asked that a proportionate reduction be made in the alternative imprisonment.

Mr. Sheil, Assistant Law Adviser, had no objection to the application.

Their lordships decided to reduce the term of imprisonment to one-half, *i.e.*, six weeks.

[Appellant's Attorney, G. M. Walker.]

SWARTS v. DICE. { 1896. May 4th.

Injury by a bull—Negligence—Liability.

D. *had some cattle, which he left with* I. *during his absence from home. After his return* D. *lived with* I., *their cattle running and being kraaled together. During this time a bull belonging to* D. *injured* S.

D. *alleged that the cattle were with* I. *under a contract of depositum and that* I. *was liable for the negligence, and the Resident Magistrate gave judgment of absolution from the instance, though* D. *in evidence stated that he and* I. *together took the cattle to* S.'s *place on the morning of the accident and left the cattle unattended.*

Held on appeal *that the evidence showed that the cattle were in the custody of* D. *and that he was liable for the negligence, and the Court ordered the case therefore to be remitted to the Resident Magistrate to assess the damages.*

This was an appeal from the decision of the Resident Magistrate, Stutterheim.

The summons claimed damages in that: "On or about the 19th day of January, 1895, a certain bull, the property of the defendant, trespassed on the plaintiff's land, being lot No. 62, situate at Ingcobo in this division, and without negligence on the part of the said plaintiff, the said bull did then and there chase, toss, and gore him, thereby inflicting pain and injuries on him, and causing him damage in the sum of £20 sterling."

The evidence showed that defendant was the owner of a bull which was hired to his brother-in-law Incaba, but that at the time of the accident the cattle (including the bull) belonging to Incaba and to the defendant were kraaled together and running together, Incaba and the defendant living together at the kraal. Defendant had been living there for a couple of months prior to the accident, though Incaba had had possession of the bull for the ten years previous.

Dice and Incaba together took the cattle with them to Swart's farm on the day that the accident happened and allowed the cattle to remained unattended. After the accident Dice caused the bull to be killed.

Before the Magistrate the defendant pleaded the general issue, and the Magistrate gave a judgment of absolution from the instance.

The following were the Magistrate's reasons:

In this case I mainly depend on the evidence of the witness Incaba, who states that he received certain head of cattle from the defendant Dice about ten years ago. A bull was one of the progeny. The defendant when he found that he could not take his cattle with him to the place where he had obtained service was going to send them to his uncle. Incaba hearing of this asked Dice (his brother-in-law) to let him have the cattle, as he was poor, and could use the cattle and also the milk of the cows. This was agreed to and Incaba had the use of the cattle for nearly ten years, and on one occasion at all events hired out the bull, receiving 1s. 9d. for its use to King William's Town. When Dice returned from his service after all these years he went to live with Incaba temporarily, but did not take possession of his cattle of which the bull formed a part.

The point of law d pended upon for the defence is that this was a contract of depositum, but I am of opinion if such a contract existed it was broken by Incaba, who refused to hand over the cattle, and it was only after repeated verbal demands that the cattle were handed over, and only after a letter of demand was sent to Incaba by Mr. Attorney Orsmond. Incaba being in possession of Dice's cattle of which the bull formed a part, and receiving remuneration in the shape of the use of the cattle and of the milk and refusing to deliver up the cattle until so demanded by an attorney's letter, I am of opinion that the contract of depositum was broken.

JNO. D'OLIVEIRA,
Acting Resident Magistrate.

Mr. Graham appeared for the appellant.

Mr. Justice Buchanan said: The Magistrate in this case has evidently been misled by some law point raised by the attorney—a point which does not affect the case in the least. The Magistrate has found that the cattle belonged to the defendant. He clearly had custody of the cattle, and should have taken steps to make the accident impossible. It is in consequence of his negligence that the accident occurred. The appeal must be allowed with costs, and the case remitted to the Resident Magistrate for assessing the amount of the damage.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

BARNARD V. BARNARD. { 1896. May 4th.

Resident Magistrate's jurisdiction—Counter-claim—Rights in future—Unliquidated damage.

A. *sued* B. *for* £20, *balance of account for goods sold and rent.*

B. *excepted to the jurisdiction on the ground that he had abandoned the premises for which rent was claimed on account of breach of contract by plaintiff, and that on account of such breach* B. *was entitled to* £50 *damages.*

The Resident Magistrate, without taking evidence on oath sustained the exception and gave judgment of absolution from the instance, on the ground that the counter-claim was beyond his jurisdiction and that rights in future were involved.

Held on appeal *that the Resident Magistrate should have tried the claim.*

This was an appeal from the judgment of the Resident Magistrate, Knysna.

In his summons the plaintiff J. S. v. d. Walt Barnard claimed £20, being the balance of his account against Jacobus J. Barnard the defendant of £31 14s. 9d., less £11 14s. 9d., waived and abandoned by plaintiff in order to bring the matter within the jurisdiction of this Court, (as more fully appeared from the account annexed to the summons) for timber sold and delivered by the plaintiff to the defendant in or about the year 1891, and rent for four years and two months at £1 per month, namely from 22nd June, 1891, to 22nd August, 1895, owed by the said defendant to the said plaintiff in respect of the use and occupation of the said defendant of certain house, ground, and premises of the plaintiff in the Knysna division.

Before the Magistrate, Mr. G. W. Brent Steytler, the agent on behalf of defendant, excepted to the jurisdiction of the Court on the grounds that the premises for which plaintiff is suing for rent are not now in possession of defendant owing to a breach of contract on the part of plaintiff, and defendant having in September last sent in a claim for £50 for breach of contract. That the contract for lease was for a period of ten years at £1 a month, that defendant left owing to plaintiff's breach of contract and that the amount of damage sustained by defendant exceeds the Court's jurisdiction—*Wienand* v. *Goldschmidt* (5 E.D.C., 257)—wherefore defendant prays the exception may be sustained with costs.

The Resident Magistrate gave judgment of absolution from the instance with costs of suit.

The following were the Magistrate's reasons:

The statement contained in the exception of the defendant that the amount sued for was claimed chiefly on a certain agreement of lease and hire, involving rights in future as well as a claim for damages for breach of contract under it, exceeding the jurisdiction of the Court, was not denied by the plaintiff:

Neither was the copy of the letter of the defendant's agent dated 14th September, 1895, filed in support of the exception, giving evidence as to the dispute then existing between the parties as to the agreement of lease, in which letter breach of contract on the part of the plaintiff is alleged, and consequent damages to the defendant in the sum of fifty pounds (£50). Under these circumstances, especially as the declaration of summons and the account rendered by plaintiff give indirect support to the defendant's contention the letter quoted was taken to be sufficient evidence of a claim in reconvention on his part, exceeding the jurisdiction of the Court, and of the existence of claims to rights in future, without calling upon the defendant for further evidence in support of them.

The following is the letter from defendant to plaintiff referred to by the Magistrate:

"Please take notice that owing to your constant notices for me to quit your property, and your breach of contract in not giving me the full, free and undisturbed possession originally agreed upon, I shall quit your premises this month and hold you liable for damages for breach of contract in the sum of fifty pounds sterling. It is impossible for me to continue to live on your property owing to your own fault by your acting as above stated.

"The balance of rent due I will retain as a set-off against my claim."

Mr. Watermeyer for the appellant pointed out that a claim for damages for breach of contract is an unliquidated one which cannot be set off against a liquidated demand. *Dale* v. *Winship* (9 J. 467). The statements in defendant's exception were not denied formally because it is not usual to file denial to an exception. They are certainly not admitted. No evidence on oath was called to support the exception. *De Jager* v. *De Jager*. (Buch., 1877, p. 140).

Mr. Justice Buchanan said that the Magistrate had certainly exceeded his powers, and the appeal must be allowed with costs, and the case must be remitted to the Magistrate for decision.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CLAN LINE STEAMERS V. ALCOCK AND CO. } 1896. May 5th.

Bill of lading—Reservation of liberty to overcarry—Gross negligence of carrier's servants—Damage after transhipment—Shipowner's liability—Merchant's risk—Special agreement—Exceptive clauses—Interpretation—Appeal.

Certain cases of goods were shipped from England to the port of E. *in South Africa the bill of lading containing a clause "the master or shipowner reserves liberty to overcarry and tranship, or land and reship at any port into any other vessel at merchant's risk but at steamer's expense any goods which for any cause whatever may not have been landed during vessel's stay at port of destination."*

The cases, which were properly "port marked," were shipped in a Clan Line steamer, but having been overcarried to the port of D. *they were transhipped thence in good order on to* M.'s *steamer* C., *in which they were taken back to* E.

They were then landed at E. *from the open roadstead on a day on which the port office signals were flying to show that the boats could work, though there was such a heavy sea running that in the course of the unloading some of the goods were damaged.*

In an action by A. *(the holder, for valuable consideration, of the bill of lading), against the Clan Line Company the Resident Magistrate awarded damages to* A., *holding that the overcarriage was due to the gross negligence of the company's servants and that the company then became liable for the damages sustained thereafter, including injury sustained, after transhipment, in unloading from* M.'s *steamer* C.

Held on appeal *that, in spite of the words* "any cause whatever," *the correct meaning of the clause in the original bill of lading is and was intended by both parties to be that some cause should operate to make it necessary, advisable, or beneficial for the shipowner to exercise the liberty to overcarry which he had reserved to himself: and that it was not reasonable that indifference or neglect should entitle him to do so unless there was clear express stipulation*

to this effect. The overcarriage having been proved to the Resi'ent Magistrate's satisfaction to have been due to gross negligence on the part of the Clan Line Company's servants, the company was held to have been rightly adjudged by the Resident Magistrate to be liable for the damage sustained thereafter and the appeal was accordingly dismissed.

This was an appeal from the decision of the Resident Magistrate, East London, in an action brought by the present respondents against the appellants for damages for injury sustained to cargo consigned to the port of East London.

Mr. Schreiner for the appellants.

Mr. Searle for respondents.

In the action in the Resident Magistrate's Court, the summons called upon the Clan Line of Steamers (as represented at East London by Henry Baily Christian, George B. Christian and Daniel E. Hockley, carrying on business at East London under the style or firm of G. B. Christian & Co.) to pay the sum of £20 as and for damage sustained in respect of certain four cases of mantels marked East London, T. A. J. & Co., numbered 2,154, 2,183-5, shipped in good order and condition by T. W. and J. Walker at Liverpool, on or about the 30th November, 1894, on board the said defendants' steamer Clan Macleod and which said four cases together with sundry others the said defendant Company in and by a certain bill of lading made and signed in their behalf at Liverpool, aforesaid on the said 30th November, 1894, which bill of lading has been duly endorsed and is the property of the plaintiffs undertook and agreed to deliver in the like good order and condition at East London unto the order of the said T W. and J. Walker, but which they have failed and neglected to do: on the contrary the said cases being landed broken, with contents chipped and broken and case No. 2,184 also having contents short and all the said cases being in an unmerchantable condition, whereby the said plaintiffs have suffered damages in the amount aforesaid.

The defendants excepted to the summons on the following grounds:

1. They say that they are improperly sued as agents; the summons should have been directed to Cayzer, Irvine & Co., the owners of the Clan Line Steamers (Limited), or against the captain of the Clan Macleod and served upon defendants as agents.

2. They further say that the action is wrongly brought. The Castle Mail Packets Co., if anybody, should have been sued by reason that by the bill of lading it was expressly contracted and agreed that the owners or master of the Clan Macleod should be at liberty to overcarry and tranship into any other vessel at merchant's risk but at steamer's expense for conveyance to destination any goods which from any cause whatever may not have been landed during vessel's stay at port of destination, and that in terms of such express contract the four cases of mantels, in consequence of being overcarried to Natal, were transhipped at merchant's risk but steamer's expense into the Castle Mail Packets Co.'s ship the Courland, in good order and condition and taken to East London the port of destination, and there delivered to plaintiffs.

3. The plaintiffs (Alcock & Co.) have no *locus standi* in this action inasmuch as they do not allege nor does the summons show any privity of contract between the parties to this suit, or that the plaintiffs have any claim whatever for delivery of said goods or to claim damages in respect thereof.

The defendants further, should the exceptions be overruled pleaded:

1. The general issue.

2. They repeat the allegations in the 2nd exception and pray that it may be considered as herein inserted.

3. If the aforegoing special plea is not sufficient, defendants further say that the damage if any to the said four cases of mantels was caused by "perils of the sea"; and under the said bill of lading, it was expressly contracted and agreed that the shipowners should not be liable (*inter alia*) for loss or damage so caused.

On these pleadings (the exceptions being overruled by the Resident Magistrate) judgment was given for plaintiffs with costs.

The following are the Resident Magistrate's reasons:

The plaintiffs' case is this:

The steamship Clan Macleod is owned by the defendant company. In this steamer Messrs. J. W. & J. Walker, of Liverpool, England, shipped and consigned certain four cases of slate mantelpieces to the port of East London. A bill of lading was signed by the master of the ship in usual form. This bill of lading the Walkers endorsed, in blank, and forwarded to the plaintiffs as consignees of the goods, and it was in ordinary course delivered to their recognised agent, Webster, at East London, the port of the ship's destination, and also of the goods. The Clan Macleod arrived in the port of East London on the 9th January last, was berthed alongside

the wharf inside the Buffalo River, and left again on the 12th of the same month after having discharged cargo for this port. The plaintiffs' goods, however, were not landed but were carried on to Natal, and were subsequently landed at East London, in so damaged a condition as to be wholly unmerchantable.

This damage, the plaintiffs allege, was due to the defendants' breach of duty and negligence, by reason of the non-delivery of the goods upon the arrival of the steamer at her port of destination. The goods were surveyed by Messrs. Fuller and Dalrymple, and upon their recommendation were sold at public auction, when they realised £5 2s.

Their invoiced price was £25 5s.

Plaintiffs claim £20 damages. In support of their contention the following evidence was submitted:

1. Bill of Lading.
2. Certificate of Fuller and Dalrymple.
3. Webster's evidence.
4. Letters between Humphrey and Webster, the respective agents.
5. Evidence of Rust the tally clerk, and Kanowsky the checker, and others.

The defendants deny their liability, and they rely partly upon the terms of the bill of lading as set forth in their special plea (originally their exception No. 2), and partly upon the evidence of Johnston, chief officer of the Clan Macleod, and that of the officers of the steamship Courland, in which the goods were reconveyed from Natal to East London. The material part of the plea is the condition whereby liberty is reserved to the defendants to overcarry and tranship, &c., any goods which, from "any cause whatever," may not have been landed during vessel's stay at port of destination. It seems to me to depend very much upon the construction to be put on the terms which reserve liberty to overcarry "from any cause whatever." Are these words to be so extensively interpreted as to exclude every element of negligence, and entitle the defendants to disclaim all liability, by merely saying "any cause whatever" is sufficient to exempt us? Or are they to be understood as subject to the limitation that the defendants are bound to show that they had exercised proper care to ensure the discharge of the plaintiffs' goods, and that the omission to do so was not due to any negligent disregard of their obligation? In *Naylor* v. *Munnik* (Searle 3, p. 187), the Supreme Court held that a special agreement to convey goods at the risk of the owner or consignor will not relieve the carrier from liability for gross negligence, and in the English case of *Lyon* vs. *Mills* (Ad. 446), Lord Ellenborough is reported to have said: "We cannot construe a contract for the carriage of goods between the owners of vessels carrying goods for hire and the persons putting the goods on board so as to make the owners say, we will not be answerable at all for any loss occasioned by our own misconduct." The defendants appear to have recognised that it lay upon them to show that the "cause" for not landing these goods was such as would entitle them to claim the benefit of this exception, and for that purpose they called Johnston, chief officer of the Clan Macleod. His evidence is, that the defendant company employ their own stevedores; that the cargo is always stowed in the order of the ports of call, to prevent any difficulty of getting at it on the ship's arrival at each port of destination, but that through some fault, not accounted for, these particular packages, though "port marked" for East London were jammed amongst the Natal cargo, and could not be got at when the ship was discharging cargo; the inference being that he knew these goods were still aboard; but there was some difficulty in getting at them. And yet, later on, he tells us that he made the most diligent search to see whether any cargo whatever had been left behind. The inference here being that he knew nothing at all about the plaintiffs' goods, because he clearly was not specially searching for them but for goods generally which might have been overlooked. Assuming, then, that he knew the goods in question were jammed amongst the Natal cargo, it was surely his duly to have explained that some efforts were made to get them out, what steps were taken, and the nature of the difficulties which rendered the attempt fruitless. No explanation is offered on these points. If on the other hand he wholly overlooked these goods, he might have discovered the omission by reference to documents at his command, for example, the ship's "manifest of cargo," tally notes (see Webster's evidence). Now bearing in mind that this ship was in the river, moored alongside the wharf, and with time and facility for discharging her cargo, does this evidence prove that these goods were not landed from any cause which even reasonably justified the omission? Or does it show that the defendants were recklessly indifferent about the matter believing that the mere fact of the goods being jammed amongst the Natal cargo was of itself a sufficient "cause" for overcarrying them, and that the wide terms of the bill of lading could be successfully advanced as an answer if anything went wrong? If the defendants cannot justify the overcarriage of these goods,

I apprehend that damage subsequently resulting from the acts of third persons in no way concerns the plaintiffs. The proximate cause will be the defendants' wrongful act of overcarrying. *Ross* v. *Rennie* (S. 3 252), appears to be the only case on this subject in our reports and that does not raise the same issue.

The defendants have raised a further issue with respect to the Castle Company's steamer Courland, admitting that the goods were overcarried to Natal and landed there. Defendants say that they were reconveyed thence to the port of East London in the Castle Company's steamer Courland, a procedure which was expressly sanctioned by the bill of lading. They contend therefore that the plaintiffs' proper course was to have sued the Castle Company. I confess my inability to grasp how this was to be brought about. On reference to the Courland's bill of lading it will be seen that the consignees are George B. Christian & Co. and the other parties to it are the Castle Company in the usual form. It is not endorsed, and there is absolutely nothing to show how the plaintiffs are connected with it. The defendants excepted to plaintiffs' *locus standi* on the ground that they had omitted to show any privity of contract between themselves and the defendants. If that position were thought tenable in respect of a bill of lading endorsed by the consignors, and of which the plaintiffs are admitted to be the legal holders, it must *á fortiori* be maintainable against this bill of lading with which the plaintiffs are not connected. How then were the plaintiffs to proceed in order to fix the Castle Company with liability?

The defendants go on to say that the damage, if any, was caused by the perils of the sea, against which they were expressly relieved from liability by the conditions of the bill of lading. It admits of no doubt that the damage complained of occurred while the goods were being discharged from the Courland in the roadstead. Tunbridge says, that the damage to the one case was due mainly to its being insecurely fastened at the ends. But apart from the fact that he is not supported by Fuller and Dalrymple I think the bill of lading and their plea stop the defendants from setting this up. They admit that the goods were shipped in "good order and condition." In *Porter* v. *Robinson* (J. 2, p. 16), and *Blaine* v. *Muller*, (J. 2, p. 133) the Supreme Court held that "good order and condition" meant, "the order and condition so far as they are apparent," and this must, I take it, have particular application to the external appearances of packages. It is admitted that discharging cargo in the roadstead is attended with various disadvantages, and even risks. The witnesses agree that the ship rolled heavily and that the lighter ranged owing to the high seas. Rust, the tally clerk, says he did not consider it a fit day for discharging cargo, and the officers of the Courland admit that it was not a favourable day for discharging, but that it could be done if extra precautions were used. Tunbridge (chief officer) says that the sea was unusually high. The term "perils of the sea" is defined to be, the dangers and accidents peculiar to the ocean, and its navigation from port to port, which no human care or skill can guard against or surmount. Now if it were possible to discharge the cargo by using proper precaution, can it be said the evidence discloses a condition of things which human skill or care could not guard against or surmount? Surely the simple answer is that all danger or chance of accident might have been averted by ceasing to discharge cargo, or by using the extra precautions which were deemed to be necessary. The first was not done, and there is no evidence explaining what special precautions were adopted. It seems unnecessary to carry the discussion further; the damage was clearly not due to perils of the sea, *but through the negligence of the ship in not adopting available means for preventing it.*

The view I take of the case as established by the evidence is this:

1. If there is evidence that the goods in question were overcarried through the negligent conduct of the defendants, the plaintiffs are not concerned with how, or by whom, they were subsequently damaged.

2. If the evidence reasonably construed proves that the overcarriage is attributable to misconduct amounting to gross negligence, the defendants cannot disclaim liability by sheltering themselves behind the condition on which they rely.

3. If the defendants seek relief by throwing the plaintiffs back on the Castle Company, they were bound to prove that the plaintiffs were parties to the contract with the Courland, or to connect them with it; and if they rely on their special plea that the damage was caused by the perils of the sea, it was their duty to establish that fact by evidence showing that it fell within the well-recognised definition of that term. The conclusion to which I have come is:

(*a*) That the overcarriage was due to the negligence of the defendants by not discharging the goods, the ship being at the time in a position where every facility was afforded for doing so,

(*b*) That the goods were not landed through negligence which cannot be regarded as other than gross; the evidence of the responsible officer clearly showing that no effort whatever was made to extricate them from the Natal cargo, if they were there; or otherwise, that he did not trouble to satisfy himself beyond searching among the débris in the ship's hold while other means existed. It seems even doubtful whether he knew they were among the Natal cargo at all until they were discovered on the vessel's arrival at Natal.

(*c*) For the reasons stated, I do not think that it was incumbent on the plaintiffs to have recourse against the Castle Company, nor do I see under the state of facts how they could reach them. And if it were necessary to decide the non-liability of the defendants by reference to the transactions of the Courland, I should say that the evidence does not support the defendants' pleas.

I am therefore of opinion that judgment should be for the plaintiffs, with the costs of this action.

JOHN F. WEBB, Resident Magistrate.

28th November, 1895.

Mr. Schreiner for the appellant argued that the phrase in the bill of lading "*at merchant's risk*" excluded any liability for what may have taken place at the landing from the Courland, though the summons ignores this transhipment. On the question of the real responsibility, see *Voet* (4, 9, 7) quoted in *Nayler* v. *Munnik* (3 Searle, 187), though the actual law laid down in that case is superseded in view of section 2 of Act 8 of 1879, which imports the English decisions in this matter. If there was negligence at all it was on the part of the stevedore. But the effect of the clause in the bill of lading reserving the liberty to overcarry and excluding liability for loss from "*any cause whatever*" is to exclude any liability on appellants' part. See *Carr* v. *Lancashire Railway Company* (21 L. J. Excheq., 261), in which case, as in this, there was a special contract, and *Austin and Another* v. *Manchester, Sheffield and Lincoln Railway Co.*, (21 L.J., Com. Pleas, p. 179). In the latter case horses were carried in terms of the contract on the ticket, which excluded liability for damage to the horses carried, "from whatever cause," it being recognised that there might be qualified acceptance of this nature by common carriers. And in a wide sense this phrase would exclude liability, not only for negligence—whether gross—see *Phillips* v. *Coope* (4 J, 53)—or ordinary (if distinguishable), but even for wilful misfeasance: *Trueman* (or *Taubman*) v. *Pacific Steamship Co.* (26 Law T. Rep. p. 704); *Phillips and Another* v. *Clarke* (26 L.J. Com. Pleas, p. 168). See also *Roos* v. *Breuning* (3 Searle, 253); as to overcarriage; *Kaffrarian Landing and Shipping Co.* v. *Donald Currie & Co.* (Buch., 1878, p. 99) and *Wodehouse* v. *Christian* (4 E.D.C., p. 183) as to liability for acts of officers of the Courland, and *In re Glendara* ("The Reports," 1894, p. 686) as to onus of proof. In the words "at merchant's risk" the Clan Line are put in this position—they, after overcarriage, tranship the goods back in the Castle Line's steamers "at merchant's risk." If the Castle Line had been sued then it would have had to be proved that the damage was not due to a peril of the sea but to negligence by the officers, and the onus would have been on plaintiffs. Yet in this case they have not proved negligence by the officers of the Courland in the slightest degree. If there was any negligence it was on the part of the stevedore, as to which see *Burschelmann* v. *Bailey* ("The Reports" for 1895, Q.B. App, p. 481). But even if there was a negligence on the part of the chief officer in not taking the proper tally at East London—yet liability for this is excluded by the words "from whatever cause." The policy of the law now is to allow common carriers to exclude any liability on proof of special contract—and the tendency of carriers is to exclude liability for everything as far as possible, and shippers can and should protect themselves by insuring.

Mr. Searle for the respondents contended that the fallacy underlying appellants' argument is that they treat the bill of lading clause in question as if the shipowner shall not be liable for any negligence whatsoever. The contention is much too wide. The shipowner must *specially* exclude liability for negligence—*Lloyd* v. *Iron Screw Co.* (3 H. and C., p. 284); the clause in question is no excuse for it, the object of the overcarriage provision is that the shipowner may be freed from liability where *compelled* to pass by the port of discharge. *Carver* on "Carriage at Sea" (p. 87, section 77). If there is any doubt in case of such an exception from liability the words must be construed against the person for whose benefit they were inserted. As to gross negligence, see *Krohn* v. *Nurse* (Buch., 1873, p. 85); *Porter* v. *Robinson* (2 J., 16); *Blaine & Co.* v. *Moler* (2 J., 133), in each of which cases the onus of proving the exemption lay strongly on the shipowner. To show how strict courts are in putting shipowners to such proof, see *Taylor* v. *Great Liverpool Landing and Shipping Co.* (L.R., 9 Q.B., p. 546); the only case laying down the general exclusion of liability is *The Duero* (L.R., Ad., p. 393). The cases relied on by appellants refer to carriage by railway not by sea.

Mr. Justice Maasdorp: They are nevertheless useful to interpret the words "from whatever cause."

Mr. Searle: The object of the clause is certainly not to give liberty to the shipowner to carry anywhere and leave them where he chooses; the phrase "at merchant's risk" only means that while overcarrying and transhipping the goods are at his risk, the risk ceasing so soon as the transhipment is complete—the words not applying to the subsequent conveyance. And we are clear of liability, as the bill of lading of the Courland acknowledges the receipt of the goods in good order and condition. As to the position of the goods after receipt on board the Courland—it is clear from the bill of lading between the appellants and the Castle Company that the latter were the agents of the appellants, who in turn were our agents, therefore there was no privity between the Castle Company and ourselves. The tally clerk clearly proved negligence on the part of the Courland officers in discharging cargo on a day when it was dangerous to do so because of the rough sea. (See *Tighe* v. *Carlingford*(3 L.R., Com. Pleas, 407).

Postea (May 11th).

Mr. Justice Buchanan, in delivering the judgment of the Court, said: The respondents, Alcock & Co., sued the appellants, the Clan Line, in the Court of the Resident Magistrate for East London for £20 damages, which the summons alleged were sustained in "respect of four cases containing mantelpieces shipped in good order at Liverpool on board the defendants' steamer Clan Macleod, and which said cases the defendants by bill of lading undertook and agreed to deliver in like good order and condition at East London, but which defendants have failed to do; on the contrary, the said cases were landed broken, and with some contents short and others broken and chipped, and all in an unmerchantable condition." The defendants took certain formal exceptions to the summons, which were overruled, and they are not now relied upon. They then pleaded first, the general issue, secondly that the action is wrongly brought in that the Castle Mail Packets Co., if anybody, should have been sued, by reason that by the bill of lading it was expressly contracted and agreed that the master or owners of the Clan Macleod should be at liberty to overcarry and tranship into any other vessel "at merchant's risk" but at steamer's expense, for conveyance to destination, any goods which "from any cause whatever" may not have been landed during the vessel's stay at port of destination, and that in terms of such express contract the four cases in question in consequence of being overcarried to Natal were transhipped at merchants' risk, but at steamer's expense, into the Castle Mail Packets Company's ship Courland in good order and condition, and taken to East London, the port of destination, and there delivered to plaintiffs; thirdly, if the aforegoing special plea be insufficient, defendants further say that the damage, if any, to the said cases of mantels was caused by the perils of the sea, liability for which was expressly excluded by the bill of lading. The Magistrate gave judgment for the plaintiffs, and in his able and lucid reasons bases his decision upon the finding that the overcarriage was due to the gross negligence of the defendants. The evidence shows that the goods were properly "port marked," but were stowed among the Natal cargo and were thus overlooked when the steamer was discharging the East London cargo at the wharf in the Buffalo River. The Chief Officer of the ship states that he did not check the invoice with the tally notes, though he says that he did examine the hold of the steamer. It is not clear that the ship's officer knew that the goods were being over-carried. Apparently he did not discover the fact till he arrived at the port of Durban. Had he known at East London that the goods had not been landed it is not alleged that there would have been any difficulty in getting at them. As to the other pleas of the defendant, the Magistrate in his reasons says, that in consequence of his finding of negligence he does not think it was incumbent on the plaintiffs to have recourse against the Castle Company, nor, in fact, does he see how the plaintiffs could reach that company; but that if it were necessary to decide the non-liability of the defendants by reference to the transactions of the Courland, he should say that the evidence does not support the defendants' pleas. The evidence referred to is to the effect that the goods were transhipped at Durban in good order to the Courland, and a bill of lading given on behalf of that vessel in favour of the defendants' agents at East London or order. When the Courland arrived at East London she discharged her cargo in the open roadstead, on a day on which the port-office flags were flying to show that the boats could work, but that owing to the sea the Courland rolled, and the lighters "ranged" very considerably. While the goods were in the slings they came in contact with the side of the vessel; one of the cases was smashed, and most of the contents dropped into the sea, and the other cases were damaged. The Courland's

officers stated that it was not dangerous to discharge cargo in such weather if extra care and precaution was taken; that proper care was used, but whether extra precautions were taken was not stated. The captain of the Courland extended a notarial protest against the loss. The issue in this case depends upon the true construction of the clause in the bill of lading set forth in defendants' plea. A condition reserving liberty to overcarry goods does not appear to be usual in bills of lading which have come before the English courts, and seems to have originated in the exigencies of the local trade. As far back as 1859, our own courts in *Roos* v. *Rennie* (3 Searle, 253) gave effect to a clause in a bill of lading of goods shipped in a coasting steamer that the delivery might be made on the return voyage if deemed expedient by the master, and held the shipowner free where the goods were not landed at the port of destination and the ship was lost before she returned to the said port. In that case, however, the question of negligence did not arise. The report of *Naylor* v. *Munnik* (3 Searle, 197) contains a dictum by the then Chief Justice, that even if there be a special agreement between a common carrier and the owner of the goods that the goods are to be carried at the owner's risk, the carrier will still be liable for gross negligence. That case, however, was heard in 1858 and the General Law Amendment Act of 1879 now make questions having reference to bills of lading subject to the rules of English law. Moreover this bill of lading provides that the law of the flag (*i.e.*, English) shall govern the contract. Formerly the perils of the sea were the only exceptions contained in bills of lading, but from time to time numerous additional conditions have become common, and English authorities now lay down that a ship owner may if he uses apt words protect himself even from the negligence of his servants. *Maude & Pollock on the Law of Merchant Shipping* (4th ed., Vol. II., p. 358); see *The Ducro* (38 L.J., U.S., Adm. 39), *Steele* v. *The State Line Steamship Co.* (3 App. Cases, 72). In this case it must be remembered that it is not a stipulation contained in a general notice or public advertisement, but it is a condition of the contract itself that we have to interpret. Now the contract contained in a bill of lading is a contract to carry the goods safely subject only to the exceptions expressed therein. In construing these exceptions the intention of the parties is to be looked to, and as a general rule no exception which is not clearly contained in the contract itself or arising by implication of law can be engrafted on it as an excuse for its non-performance. In the condition of the bill of lading under consideration in this case negligence is not in terms excluded, though in another part of the same contract negligence or error of judgment on the part of the pilot or servants of the shipowner in the management or navigation of the ship, not resulting, however, from the want of due diligence by the owners, is expressly stipulated against. The case of *Philip Bros.* v. *Koop* (4 Juta, 53), and the authorities there cited show that the general rule for construing the conditions of a bill of lading is that a stipulation that the shipowner shall not be accountable for any specified cause of damage does not exempt him from responsibility for a loss by such cause when it arises from negligence. In other words that it must be clear from the contract that loss through negligence is one of the risks intended to be guarded against. If we look at the very first condition of this bill of lading we find it provides "In case the ship shall be prevented from any cause from proceeding in the ordinary course of her voyage, the shipowner has liberty to tranship the goods," &c. Could it be held that these words "any cause" in this condition include negligent and wilful default in not proceeding on the voyage? I think not. In my opinion it could not be said that these words show that such was the meaning and intention of the contracting parties. To graft negligence upon them would be to extend their construction beyond legitimate limits. Must then similar words in the same bill of lading, strengthened by the additional "whatever" be construed in a wider sense? The stipulation reads as follows: "The master or shipowner reserves liberty to overcarry and tranship or land and reship at any port, into any other vessel at merchant's risk, but at steamer's expense, any goods which, from any cause whatever, may not have been landed during vessel's stay at port of destination." Mr. Schreiner's contention is that assuming the Magistrate was correct in finding that the overcarrying was due to negligence, yet that the words "any cause whatever" cover such negligence. In support of that view he has cited the case of *Taubman* v. *The Pacific Steam Navigation Company* (26 L.J. Ex, 704), in which it was held that where the contract between a shipowner and a passenger contained a provision that the shipowner would not be answerable for loss of baggage "under any circumstances whatever," that such a stipulation covers wilful default and misfeasance by the shipowner's servants. The words there are certainly very wide, and one of the judges ex-

pressed the opinion that they were probably inserted for the very purpose of exempting the company from liability for the acts of their servants. In *Carr* v. *The Lancashire and Yorkshire Railway Company* (21 L.J.. p. 261), the conduct was conditional that the owners of the property conveyed, in that case a horse, undertook all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage, however caused, occurring to live-stock travelling upon their railway. The jury found that the company had been guilty of gross negligence, but on a rule for a new trial, the full Court held that the contract exonerated the company. The grounds of decision is thus clearly put by *Martin, B.*: "I am to look only at the terms of the notice, and if the carrier had been desirous of preparing a contract by which he would get out of his liability in respect of gross negligence, he could not have used more apt words than those that are contained in this notice." It will be seen that by the condition the owner undertook all risks as well as that the company disclaimed liability for any injury. *Austin* v. *The Manchester &c. Railway Company* (21 L.J., C.P. 179) is another authority to the same effect, and under like circumstances. But to give the words in the condition under consideration the wide meaning the appellants contend for would protect the shipowner if his servants arbitrarily and without any reason refused to deliver the goods at the port of destination, and should overcarry them to any other port. I cannot think that the parties ever contemplated such a course of dealing. The contract must receive a reasonable interpretation. Taking the clause as a whole, in my opinion the words mean, and were intended by both parties - certainly by the shippers—to mean, that some cause should operate to make it necessary, or at any rate advisable or beneficial, for the shipowner to exercise the liberty he had reserved to himself, and not that indifference and neglect to perform his part of the contract should entitle him to do so. If the clause is ambiguous and of doubtful meaning it ought to be construed most in favour of the shipper and not of the shipowner, for whose benefit the exception was framed. The case is by no means clear, but considering the tendency to restrict and not to extend the interpretation of the exceptive clauses of bills of lading, I think it more reasonable to hold that negligence is not included under the words relied upon, than that it is so included. The evidence shows that ordinary care and diligence would have secured the delivery of the goods in question in good order and condition at East London, and that they could conveniently have been discharged at that port when the steamer lay in the river alongside the wharf. As they were not so delivered it is not necessary to follow the goods further and determine whether or not any liability attached to the Courland. The Magistrate has found negligence, and there is evidence to support that finding. Mr. Schreiner, too, was willing to argue the case upon that assumption, and waive the technical objections raised in the Court below, so as to have a decision upon the merits. The amount for which judgment was given was also admitted to be correct. In my opinion, therefore, the appeal must be dismissed with costs.

Mr. Justice Maasdorp said: I concur in the judgment. I am also of opinion that it is within the power of shipowners to stipulate that they shall not be responsible for damage occasioned to shippers of goods through the negligence of their servants. That has been decided in the cases of *The Duero; and Steel* v. *The State Line Steamship Company*. But since it is the main duty of a shipowner to use due diligence in the conveyance and delivery of goods entrusted to his care, if he desires to protect himself from liability for the negligence of those in his employ, he must do so in plain and unmistakable terms. In that case shippers will know what risks they expose themselves to; and shipowners will have to put up with the consequences which such a plain repudiation of responsibility may have on their trade or business. So long as the terms of the contract contained in the bill of lading admit of doubt in that respect, it must be taken that the shipowner remains liable for negligence. It is said that the words used in the present bill of lading express the intention of the parties that even where the overcarrying is the result of negligence, no liability for consequent damage or loss should fall on the defendants. The words relied upon are the following: The owners reserve liberty to overcarry, and to reship at merchant's risk, any goods which from any cause whatever may not have been landed during the vessel's stay at the port of destination. If they had merely reserved the liberty to overcarry they would still, on the principles underlying all the decisions in analogous cases, have been liable for negligent overcarrying. But it is said the words, "from any cause whatever," leave it free to them to overcarry under any circumstances, even though negligence on the part of their servants is the circumstance which gave rise to the goods being carried on. It will be seen that the words "from any cause whatever" are not used in connection with the liberty allowed, but with the reshipping of goods

which from any cause whatever may not have been landed. But however that may be, I take the word "cause," if used in connection with the liberty to overcarry, as meaning not simply something which produces a certain effect, but rather a reason or motive for an action. If the owners have a reason for exercising the liberty to overcarry, whatever that reason may be, they will have free scope for the exercise of their discretion. Their action will not be too closely scrutinised, but it must be reasonable. Among such considerations there is no thought of negligence. All the causes or reasons which may render it necessary or convenient to the owners to overcarry cannot be detailed in the bill of lading, and therefore general terms are used. I come to the conclusion that there is nothing in this clause to protect the defendants from liability for overcarrying, if it occurs through the negligence of their servants, and that it cannot be maintained, as was contended, that no liability falls upon them for carrying on goods even it be through negligence. Then it may be said that even supposing negligence caused the overcarrying, it was still necessary to send the goods back, and in that case the shipper agreed in the bill of lading to have the goods conveyed back in another ship at his risk. If the goods were carried on through negligence, and if a liability was in consequence incurred by the shipowner, then there is authority for saying that he will be responsible for damage sustained thereafter, even if it be occasioned by the act of God. Can it be said that there is a clearly expressed intention of the parties that he should be relieved from such responsibility already incurred by merely placing the goods in another ship? Is it clear that this is one of the risks which the shipper takes upon himself? I do not think the parties contemplated such a result. It may be that all risks after transhipping would be upon the owner of the goods if the shipowners were not to blame; it may be that even if they were, certain risks may still be on the shipper. But as the words stand in the bill of lading they do not necessarily signify that when the shipper accepts risks after transhipment he releases the shipowner from responsibility for damage which is the direct result of his original negligence. The damage in this case was the direct result of the action of the defendants' servants, who through negligence carried the goods out of the port of East London, where the ship was lying alongside the wharf, and thus rendered it necessary subsequently to sling them into a lighter from the deck of the Courland, where the damage was done. I am of opinion that the defendants are liable, and the appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

YATES v. WIID. } 1896. May 6th.

This was an action for the recovery of £20 with interest at the rate of 8 per cent. from November, 1893, and £32, with similar interest from February, 1894, less £12 paid on account in June, 1894.

The plaintiff's declaration set forth: (2) That the defendant is indebted to him in the sums of (*a*) £20, with interest at the rate of 8 per cent. from the 15th November, 1893; (*b*) £32, with interest at the rate of 8 per cent. from 15th February, 1894, less the sum of £12 paid on account in or about the month of June, 1894, for money lent and advanced to the defendant by the plaintiff at the special instance and request of the defendant in or about the 15th November, 1893, and the 15th February, 1894, the defendant having agreed to pay interest at 8 per cent. on the said amounts. (3) All things have happened, all times elapsed, and all conditions fulfilled to entitle the plaintiff to claim the said amounts together with interest thereon, but the defendant, though requested to do so, refuses to pay the said sum of £40 or any portion thereof.

The plaintiff claimed: (*a*) Judgment in the sum of £20, together with interest at 8 per cent from the 15th November, 1893. (*b*) Judgment in the sum of £20, with interest at 8 per cent. from the 15th February, 1894. (*c*) Alternative relief. (*d*) Costs of suit.

The defendant, in his plea, admitted that in November, 1893, he borrowed £10 from the plaintiff (not £20, as alleged in the 2nd paragraph); and alleged repayment of the amount in two instalments of £5 in or about May, 1894, and October, 1894.

He further admitted having borrowed £22 (not £32 as alleged) from plaintiff in 1894; and alleged repayment of this amount in instalments of £12 in July, 1894, and £10 in October, 1894.

He denied having undertaken to pay any interest on the loans; and denied liability for the sum of £40, and admitted having refused to pay the said sum or any part thereof.

The replication was general.

On these pleadings issue was joined.

Mr. Graham appeared for the plaintiff.

Mr. Sheil for the defendant.

Joseph Yates, Cape Town, said he had known defendant for eight or nine years, and had had business transactions with him. He had lent him money on various occasions, and had always been repaid until 1893. They settled up in October, 1893. In November, 893, defendant borrowed £20. He said he had ordered a cab from Parsons in Buitenkant-street, and wanted £80, but witness said he could not advance all of this. No documents passed, as witness could not write or read. The money was lent at 8 per cent. interest, defendant offering that amount. In February he came again to borrow money, witness then living in Church-street in Mrs. Scheepers' house. She was present when he advanced £32 to the defendant. They were in the passage when defendant came and asked for the money. He lent him all he had at the time, and it was understood that the interest should be at the rate of 8 per cent. as before. Defendant promised to repay the money as quickly as he could. About two months afterwards—about April, 1894—he asked for a return of some of the money, but defendant said he had none. A month later defendant, when pressed for repayment, said that his cabdrivers were unreliable, and were taking his money, so that he had none. In June, however, defendant gave him £12. Defendant made a pretence of secrecy, saying that he did not want people to know his debts. Later defendant wished to borrow more money to buy galvanised iron to make a shed for his carts. He knew a Mr. Esau Epstein, who had previously collected money for him, and he gave him a commission to collect defendant's debt; but he was unsuccesaful. In July or August witness again tried to collect money from the defendant, but without avail. In February witness was going to England, and pressed defendant, who said he would borrow money from Mr. Tothill the druggist or Mr. Fraser, but returned and said he could not borrow the money. Afterwards defendant said that Mr. Hofmeyr would lend him £100 if witness would stand security; but this witness refused to do. The defendant, on the last day before witness went to England, promised to repay his agent, Hoogendoorn, in monthly instalments. On his return after ten months his agent had not got any money, and when defendant was seen he said he would pay in eight or nine days. On his last interview with the defendant he admitted having £30, but wanted to buy horses. Witness refused to let him do so, and defendant thrust him out of the house. Letters of demand met with no response, until proceedings were threatened, then a denial of the debt was received.

Cross-examined: Until January last he and defendant were very good friends. They had met at St. Helena Bay, where he was trading. He had occasionally been to the defendant's house when defendant was absent. He kept his accounts in his head. He was positive that he had lent the amounts he had specified. He never lent money without interest—it was ridiculous nonsense to suppose that he would. Since November, 1893, Epstein never received money from defendant on his account. He denied that the signatures on receipts in the book produced were in his handwriting.

Mr. Graham objected to the receipts going in as no notice had been given of them.

Cross-examined: He denied the signature on a promissory note given to Mr. J. J. Hofmeyr by defendant, for which he (witness) stood security. Afterwards he said he did not know the writing. He had had unpleasantness with Mrs. Scheepers. It had nothing to do with this case. He could not say why the specified account sent to defendant made no reference to interest. He had never been convicted of a crime in St. Helena Bay. He had been in difficulties about a watch there.

Re-examined: He had not been fined for anything in St. Helena Bay. He had been fined £5 in Cape Town for assaulting Mrs. Scheepers, and had not since been in her house.

Mrs. Catherina Scheepers, Cape Town, said that in 1894 she and her husband lived in plaintiff's house in Church-street. She had seen Wiid twice. Once in 1894, she believed in February, defendant came to the house and saw plaintiff. They came into the passage, and plaintiff counted out £32 to the defendant, who promised to repay as soon as possible.

Cross-examined: The £32 was in gold.

Esau Epstein said he had collected money from defendant for the plaintiff. That was in 1891 or 1892. It was not after November, 1893. He remembered plaintiff going to England, and defendant had sometimes met him (witness), and they had talked of the debt which defendant owed to plaintiff.

This concluded the case for the plaintiff.

Siebert Johannes Wiid, the defendant, said he was employed by Mr. Bates. He had known plaintiff for eight or nine years, and had frequently borrowed money from him. All the amounts borrowed were repaid. In November,

1893, plaintiff lent him £10. He had repaid the amount in two instalments. In May, 1894, he had repaid £5 and had received a receipt for the amount in a book. When the loan was made in 1893 no reference was made to interest. He had never been charged interest by the plaintiff. In February, 1894, he borrowed £22 from the plaintiff, of which £12 was repaid in July, 1894, and £10 was repaid in October, 1894. He had got receipts for both amounts in the book. In January last he got tired of the manner in which plaintiff kept coming to his house, making free with everything and helping himself to food whenever he liked, so he turned him out.

Cross-examined: He had seen the signatures to the receipts in the book produced signed by plaintiff in his presence in his house. The dates had not been altered since the signatures were made; but it was different ink. He (witness) went over the dates with different ink as the first writing was so faint. The last time a signature was made they had to get a fresh bottle of ink and he made the figures plainer. No figures had been altered. There had been no changes in the dates from 1892 to 1894 or 1893 to 1894. All the re-writing of the signatures had been made in the presence of plaintiff at the time the last payment was made. He had bought a cab from Mr. Parsons. He had £45 of his own and plaintiff stood security for the other £40 borrowed from Mr. Hofmeyr. With the money he got from plaintiff he bought a horse. He had borrowed money from Mr. Tothill and Frasers. He had bought forage with the £22 that plaintiff had lent him.

Re-examined: The re-writing of the dates in the book was because the signatures were so faded. Plaintiff saw him do it.

By the Court: He had not got receipts for all the repayments he had made to plaintiff. He did not know why he had altered the last figure in one of the dates from 1893 to 1894. He did not think he had done so.

Mr. Graham in his address characterised the defence as an audacious attempt at a swindle which had broken down completely.

Mr. Justice Buchanan said: In this case the matters in dispute are two loans between the parties. The first loan was in November, 1893, and the second in February, 1894. It is disputed between the parties as to the amount of the two loans. The plaintiff says that the first loan was for £20 and the defendant admits that it was for £10. We must say that in this case the evidence of both parties is far from satisfactory. That of the plaintiff's was not given in such a manner as to satisfy us that he can altogether be relied upon. But the defendant's evidence is certainly most unsatisfactory. The defendant admits that he borrowed £10 on the first occasion and the onus therefore lies upon him to prove the discharge of his liability. In the absence of corroboration so far as the plaintiff is concerned we can only go so far as the admission of the defendant, which is that he owes £10. The second loan the plaintiff says is for £32 and the defendant says for £22 only. There is £10 here also in dispute. But in the matter of that loan, the plaintiff is distinctly corroborated by Mrs. Scheepers, who seems to have no interest in the case, and is the most satisfactory witness we have had before us to-day. We have therefore come to the conclusion that the second loan was for £32, and not for £22. This corroboration goes to support the plaintiff's evidence with respect to the other loan; but in the absence of any writing in acknowledgment of the debt, which might easily have been obtained from the defendant, we are not inclined to support such a loose transaction. We shall therefore give £10 and £32, altogether £42. There is an admitted repayment of £12, leaving a balance of £30. The onus is now on the defendant to prove discharge of the liability for £30. In attempting to do so, he produces a rough book showing certain receipts. We have no doubt that the dates in the book have been altered. The first receipt is dated April 20, 1892. This evidently must refer to some previous transaction. The second and third also must refer to some previous transactions to those in dispute. Then comes the receipt given in May, 1894, for £5, but after that comes an entry: "Received on account from Epstein, October 30, 1894, £5." With reference to this, Epstein says he never received money after November, 1893, and this is October, 1894. There has certainly been a mark over the date in black ink, but I cannot discover any alteration in the figures underneath. It is however a very suspicious marking, taking into consideration the fact that Epstein says he received no money at all on that day. When we come to look at the book again, we find that the next item below this is one of August 12, 1894. Evidently this was entered subsequently to the one dated October, 1894. The receipt is for £12 paid in August, and is entered after the one of October. It is clear therefore that this is a book on which no reliance can be placed. Beside this a receipt for £12 entered as if it had been paid on October 12, 1894, is also entered after a receipt dated October 30, 1894. There is certainly no reliance to be placed on the book. We think the defendant has wilfully altered the figures, and we should have had no hesitation in giving judg-

ment for the full amount, but looking at the unsatisfactory nature of plaintiff's own evidence, we think we cannot go beyond the amounts in which corroboration has been given. Judgment will, therefore, be given for £10 and £32, making £42 in all, less £12 admitted to have been repaid, and costs. Inasmuch as there has been no satisfactory evidence on the point of the interest, 6 per cent. per annum will be allowed from the day of demand, January 21 last. We think that defendant's conduct has been most reprehensible. We can say nothing further than that. It is a matter of oath against oath, and we shall make no further remarks, as it is a matter which may be prosecuted further.

[Plaintiff's Attorneys, Messrs. J. C. Berrangé & Son; Defendant's Attorney, J. Ayliff.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

IN THE ESTATE OF THE LATE HENRY J. HALSE AND ANN L. HALSE. { 1896. May 7th.

Executor testamentary—Physical infirmities—Cancellation of appointment.

Mr. Molteno applied for the cancellation of the appointment of James W. Halse as executor testamentary of the said estate, he being in ill-health and of weak eyesight, and unable to perform the duties of his trust which, in terms of the will, would extend over a period of seven years.

The Court made an order relieving the petitioner from the trust, and ordering a meeting to be called for the election of an executor dative in his place.

IN THE MATTER OF THE MINOR GAMMAT JOHAAR.

Mr. Molteno applied for authority to Gadieja, executrix testamentary jointly with the minor of the estate of the late Sleman Johaar, to take over the landed property of the estate, consisting of three houses in Rose-street, at a valuation approved by the Master of the Supreme Court.

Application granted.

THE PETITION OF GEORGE ST. L. LENNOX.

Mr. Buchanan applied for leave to sue by edictal citation in an action against Jasper Dippenaar for the recovery of the amount of a promissory note due by him and one Gert Maass, and of which applicant is the legal holder by cession.

The Chief Justice said the application must be postponed. It must be first ascertained whether Dippenaar had changed his domicile to German Damaraland. His last known place of residence must be found and a summons served there. If it was then found that he had no place of domicile in the Colony, then the application would be granted.

MORDECAI V. CAPE LIME COMPANY.

To make absolute the rule *nisi* admitting the applicant to sue *in formâ pauperis* in an action for breach of contract, damages, and arrear wages due.

Mr. Watermeyer appeared for the applicant.

Mr. Benjamin appeared for the defendants.

Mr. Watermeyer formally made the application, but said that he had advised his client to go to arbitration, as had been suggested by the defendants.

Mr. Benjamin read an affidavit opposing the application on the ground that the applicant was not entitled to sue as a pauper, having a good contract in hand at the present time.

Their Lordships said there were statements in the affidavit which required an answer, and the application would be postponed *sine die*, and in the meanwhile they thought the applicant would be well advised to go to arbitration.

CLARKE V. ST. LEGER AND OTHERS. { 1896. May 7th.

Libel—Justification—Public benefit—Self-protection.

A., *the manager of a newspaper, published a notice in his paper informing the public that* C. *had been receiving subscriptions therefor and that* C. *had no authority to do this.*

In an action by C. *for libel the Resident Magistrate holding that* C. *had wrongfully received money from* D. *as such subscriptions, though he did not supply the papers and was not authorised to receive the subscriptions gave judgment for* A.

Held on appeal *that even if the words were defamatory,* A. *was amply justified in publishing the notice as there had been at least considerable negligence on* C.'s *part and it was for the benefit of* A. *and of the public that such a notice as that complained of should be given.*

This was an appeal from the decision of the Resident Magistrate of Wynberg, in an action brought by F. H. Clarke & Co. against Fred. York St. Leger, Fred. L. St. Leger and Fred. E. Garrett respectively as proprietor, manager, and editor of the "Cape Times."

Mr. Benjamin for appellants.

Mr. Sheil for the respondents.

The summons called on the defendants to answer Fred. H. Clarke, trading at Cape Town, under the style or firm of F. H. Clarke & Co., publishers, in an action of libel: In that on the 9th day of March, 1896, and at Cape Town, the said defendants printed and published in the "Cape Times" aforesaid of and concerning the said plaintiff the false and defamatory libel following:—"Notice.—It having been brought to my notice that Messrs. F. H. Clarke & Co., of Cape Town, have been receiving subscriptions for the 'Cape Times' I hereby warn the public that they have no authority to receive or collect moneys on my account or represent me in any way.—(Signed) F. L. ST. LEGER, manager, 'Cape Times.' 7th March, 1896." Meaning and intending to convey that the said plaintiff had wrongfully and illegally represented, for an improper purpose and with an improper and dishonest motive, himself as a duly authorised and appointed representative of the "Cape Times," and that by such false representations he had and would obtain certain sums of money that but for these representations would be received by the proprietors of the "Cape Times" newspaper, or that he, the said plaintiff, as aforesaid, was obtaining business credit and support by means of a false representation that he is the agent or representative of the "Cape Times." The plaintiff claimed £20 as damages.

Before the Resident Magistrate the defendants pleaded:

1. The general issue.

2. That the words complained of do not bear the construction placed upon them by the plaintiff.

3. That the words and advertisement complained of by plaintiff are not libellous and therefore not actionable. If the foregoing pleas be deemed insufficient, but not otherwise:

That he caused the advertisement to be inserted (without malice) and was justified in so doing, to protect his interests, and where his interests were concerned, inasmuch as the plaintiff had collected and received from one Clarke [proprietor of the Royal Hotel] the sum of £9 2s. sterling in or about the month of December, 1895, which aforesaid sum of money was due and owing by the said Clarke to the said defendants, and that the said plaintiff had no legal right or authority to collect or receive the aforesaid sum from the said Clarke for account of the said defendant, and he the defendant was justified in causing the said advertisement to be inserted to protect his interests.

The Magistrate dismissed the case, upholding the plea of justification under the circumstances. The following were his reasons:

It appeared to me after hearing the evidence for defence on the pleas set forth, that the plaintiff had wrongfully received from one J. Clarke a certain amount which was stated by plaintiff in his account rendered to be for twelve months' subscription to the "Cape Times," whereas the plaintiff had no right to make such charge not supplying the copies of the "Cape Times" charged for, or being in any way authorised by the defendants to receive subscriptions to the "Cape Times" on their behalf.

Under these circumstances it was considered that the advertisement complained of as libellous was justifiable, in order to protect the interests of the defendants as well as for the public benefit.

Mr. Benjamin, for appellants, said that a large order was given by Mr. Clark, of the Royal Hotel, to F. H. Clarke & Co. to supply various newspapers, including the "Cape Times." The "Cape Times" people refused to take the order from F. H. Clarke & Co., so the latter directed a boy to procure the papers for them daily. By some oversight the papers however were supplied direct to the Royal Hotel. The respondents plead justification, the law as to which is laid down in *Botha* v. *Brink* (Buch., 1878, p. 123), viz., there must be both truth and public benefit. Even if there was a *bona-fide* mistake by Mr. St. Leger as to the facts that would only go in reduction of damages: (*Hart* v. *Norden* 3 Menz., 548, *Folkard on Libel* p. 544). But it is no defence. *Michaelis* v. *Braun* (4 J., 208); *Mourant* v. *Raubenheimer* (1 App., 93). Even if there was any truth in the statements the respondents went further than was necessary.

Mr. Sheil was not called upon to reply.

The Chief Justice said: The defamation complained of is contained in the following notice printed in the "Cape Times": "It having been brought to my notice that Messrs. F. H. Clarke & Co., of Cape Town, have been receiving subscriptions for the 'Cape Times,' I hereby warn the public that they have no authority to receive or collect moneys on my account, or represent me in any way whatsoever.—F. L. ST. LEGER, manager." I am not perfectly satisfied that these words are necessarily de-

famatory, but I will presume that they do contain some defamation against the plaintiff. Then comes the question as to whether the defendant has succeeded in proving the plea of justification. In my opinion he has amply proved justification. I do not say that there was anything necessarily fraudulent in the action of the plaintiffs, but it was such as to justify the defendant in warning the public against paying money to the plaintiffs. The facts are briefly these: An order was sent by the plaintiffs to the "Times" to supply six copies of the "Cape Times" to Mr. Clark of the Royal Hotel. The "Times" refused to comply with this order, and said they were not prepared to supply in this indirect manner any copies of the "Times" to customers. The defendants may have been right or wrong in doing this, but they were perfectly justified in refusing the order. After this refusal the plaintiffs received money in advance from Mr. Clark, of the Royal Hotel, for these copies of the "Cape Times." In my opinion plaintiffs had no right to do it. They had a perfect right of course to purchase the "Times" from any source whatever and supply the copies to the Royal Hotel, but they did not do so. The "Cape Times" continued to supply direct to Clark these copies of the "Cape Times." Under these circumstances the plaintiffs had no right to charge Clark with the price of the copies. When it came to the notice of the manager of the "Cape Times" that the plaintiffs had done this he was quite justified in giving this notice to the public. It was for the benefit of the defendants, and also for the benefit of the public that it should be known that these subscriptions could not be received on behalf of the manager of the "Cape Times" by the plaintiffs. It does not necessarily imply anything fraudulent in the conduct of the plaintiffs, but it does prove considerable negligence. It was by this conduct that the plaintiffs brought this notice upon themselves, and under these circumstances the Magistrate was quite right in giving judgment for the defendants, and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, D. Tennant, jun.; Respondents' Attorneys, Messrs. Reid & Nephew]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

MALAN v. MALAN. { 1896. May 8th.

This was an action for divorce on the ground of the defendant's adultery. The declaration alleged that the parties were married at Ceres on the 4th of February, 1878, in community of property; that the marriage still subsists; and that there were born thereof three children who are still minors; and that in February, 1896, at Kalk Bay, the defendant committed adultery with a woman to the plaintiff unknown.

The plaintiff claimed: (*a*) Decree of divorce; (*b*) division of the joint estate; (*c*) custody of the children; (*d*) that the defendant be ordered to pay the sum of £10 per month for the support and maintenance of the children; (*e*) alternative relief and costs of suit.

The plea admitted the facts in the declaration save as to the adultery.

Mr. McGregor appeared for the plaintiff.

Mr. McLachlan appeared for the defendant.

Mrs. Esther Johanna Malan said she was married in February, 1878, at Ceres. There were three children of the marriage, the oldest, a boy, seventeen years old, and the others, girls, thirteen and twelve years of age. After the marriage she had lived until September last—seventeen years and eight months—with her husband. Then she left him, because of his misconduct. She joined him again for a few days, and left him again in October, again because of his misconduct. They were married in community of property. Her husband had not supported her since she left him. She claimed divorce on the ground of his adultery. She wished for custody of the children. Her son said he wished to live with her. As the mother, she would not think it desirable that the children should live with the father. They had noticed the immoral actions of the father, and had remarked upon them to her. He was not a drunkard.

Cross-examined: The defendant was a farmer and trader. Their life had been happy for fourteen years, until she found out his actions. She had borne with him as long as she possibly could. She knew Mr. Hugo, but it was not through him that those disturbances had arisen. Her husband had never complained of him coming too frequently to her house. Their farm

had been sold, and she went to Ceres, whilst her husband went to the Orange Free State. He left her with £10, and she also collected £15. He left the furniture, a cart and mules, and some shares in the Brandy Company, but the latter he stopped her from getting. He had written two letters and asked her to come to him, but she did not go, nor did she write. Afterwards he wrote to her from Kalk Bay that he had purchased a farm at Retreat. Since his return from the Free State he had once been to her brother's farm, but he had not asked to see her.

Re-examined: On the previous occasion she had instituted an action for divorce, but he came and said that he was a reformed man, and she forgave him. She had not received any of the shares. She had brought £2,000 into the community.

Further cross-examined: Her husband had the control of the money. It might have been lost, but she had not had control of it. The £2,000 was handed straight to him by her brother.

Mrs. Charlotte Campion, of Kalk Bay, said she knew the defendant. He had stayed at her boarding-house in January last. He had a coloured woman with him, and they lived together as man and wife.

Cross-examined: He had since stayed at her house alone for a couple of days.

Re-examined: Since the proceedings had been instituted the defendant had been to her house, and asked her to say he had never been to her house under the circumstances she had mentioned.

Dirk van Renen said the last witness was his mother, and he corroborated her evidence.

No evidence was called for the defence.

The Chief Justice said: It is quite clear that the defendant committed adultery, and was well advised not to appear in the witness-box and deny the clear and explicit statement given by the witnesses for the plaintiff, and a decree of divorce must be given. It is also clear that the defendant was not a fit person to have the custody of the minor children, especially the two young girls. His example would certainly not be such as the Court would approve. The plaintiff will have the custody of the children, the defendant to have the right to visit them at reasonable times and places. The Court will order a division of the property in community, and the Court will appoint Mr. G. W. Steytler as receiver, and request him to report to the Court upon the value of the estate as soon as the estate has been divided. The Court will further reserve the question of the amount of contribution by the defendant to the support of the children until the report of the receiver has been furnished to the Court. The defendant will pay the costs of this action. Plaintiff's expenses as a witness will be allowed.

Their lordships concurred.

[Plaintiff's Attorney, W. E. Moore; Defendant's Attorney, H. P. du Preez.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

ROSS V. ROSS AND ARCHER. { 1896. May 11th.

This was an action by the plaintiff against his wife for divorce, for division of the joint estate, and for £300 damages against the co-respondent.

Mr. Benjamin appeared for the plaintiff.

Mr. Graham appeared for the co-respondent.

Andrew Ross said he and his wife were married in February, 1895, at Cape Town. He then belonged to the C.M.R., and was sent to Pondoland, but he subsequently left, as his wife had gone to Cape Town. He then took over the Welcome Hotel, D'Urban-road, in November, 1895. Early in 1896 he met Archer, the co-respondent, who had been appointed constable at D'Urban-road, and became friendly with him. He soon afterwards saw Archer and his wife fooling about playing. One day later he saw his wife reading a letter whilst standing in the bar. He asked what it was, and saw it was a letter from Archer. The letter read: "I trust you will forgive my writing to you, but I cannot keep it. I must say to you what I now tell you that I am fairly over head and ears in love with you, and if I thought that you would be true to me, I would venture to ask that you would be ready to come to me. Fondest love. Ever yours, I hope. —H. Archer." He afterwards found a second letter in a drawer used by himself, saying: "You will forgive me for not giving you the letter I promised this evening. I had to go out this afternoon, and was prevented from finishing the letter. Try to get your old man to go to town to morrow morning. I am coming to see you, dearest. Trusting you mean all you say, dearest. I am yours, I hope.—H. Archer." He told her to stop that conduct with Archer, and then she confessed to having misconducted herself with him, and promised not to do it

again. He said nothing to Archer, thinking it would be best to keep the matter quiet. He tried to sell the hotel, intending to take his wife away where no one knew of the matter. He had since sold the hotel. On Easter Monday he went to another hotel, about 500 yards away from his own, and met Archer there. They had drinks together, and then proceeded to Archer's house. Archer then said he was going on duty, and witness then went home, taking a cart which was passing. He reached the hotel and saw Archer's horse at the back door, and he then made a search of the house to find his wife. He was not successful, and he then went outside and found his wife and Archer in the kitchen committing the offence complained of. He did not go into the kitchen. He thought that if he did there would be trouble, and he would kill Archer or his wife —one of the two. He went to the bar and had a drink, and then went back to the dining-room, and found the defendant and co-defendant standing together. He was sure it was Archer because of the uniform, and also because of the horse. When he saw his wife alone again he spoke to her of the matter, taxing her with the offence. She admitted it, and from that time there was no cohabitation between them.

Cross-examined: His wife had £338 when he married her. Most of it had been spent. When his wife left him in Pondoland she left him without his consent or knowledge, but she wrote to him from Cape Town, and he came at her desire. She had packed up once at the Welcome Hotel to leave him because of his complaint of her first offence with Archer. He had told Archer that she was going to leave him (her husband), but he had not told him why. There had not been a conversation some time before April between himself and Mrs. Archer as to what means it was necessary to take to get a divorce in South Africa. It was not unusual for Archer to go into the hotel by the back door when he was in uniform. On the day after the offence on Easter Monday, he drove Mrs. Archer from his hotel to her house, but he did not speak to Archer, who was seated writing at the table. After his wife's first confession, he had allowed Archer to speak to his wife just as much as ever, because he was a policeman. He had always been friendly with Archer right to the last.

By the Court: He was quite sure of the adultery.

The Chief Justice: You don't seem to have minded it very much. Why didn't you go into the kitchen?

Witness: I was sure to have gone for him, and I just wanted a divorce from her.

Re-examined: He had not extracted a written confession of the misdemeanour from his wife

Sarah Hendriks, servant at the hotel, said she had seen Archer kissing Mrs. Ross in the dining room.

Cross-examined: That was a week before Easter Monday. She had seen Mr. and Mrs Archer sleeping together since Easter Monday, when she took coffee to the room in the morning.

Maria Susan Ross, the defendant, admitted having been guilty of misconduct on several occasions with the co-respondent. After Easter Monday she and her husband had not cohabited.

Cross-examined: She would be glad to get a divorce from her husband, because she had done wrong. She left Pondoland because she had not liked the place. She had come to court because she had received a summons. She had written a confession without any prompting by her husband. She told Archer that if her husband found her out he would be angry. Archer then said he would shoot her if she told him. Archer had prompted her to steal her husband's money and give it to him, that she might have a place to go to if her husband found her out.

Re-examined: She was now seventeen years of age.

That concluded the plaintiff's case.

Henry George Archer, the co-respondent, said he had been a police-constable at Durbanville He went there on January 7, 1896. He got to know them on January 8. He had been married twelve years and had two children. He used to live about 500 yards from the Welcome Hotel. He admitted writing the letters, but he denied having committed the offences alleged. On the Easter Monday he saw the plaintiff at his house and told him he must go round to his hotel to look for two men who were "wanted." When he was in the hotel that night all the doors were open. He saw Ross almost as soon as he got there, and Ross remarked, "I'm here as soon as you." They chatted together a little, and witness had a drink and then left. Ross went to the Paarl on the day following, and in the evening came past his (witness's) house and had a long talk. Next day Ross said that his wife was going to leave and had packed up a box, and said that she was going to take only £2. He had had to sell his furniture to defend that action.

Cross-examined: He had no immoral intention in writing to Mrs. Ross to try to get her to get her old man to town. He had put in the remark, "to get you to promise you will give yourself to me," just to fill up the letter. He had not made improper advances to Mrs. Ross's

sister. He had not been charged by other people in Durbanville with making advances to ladies.

By the Chief Justice: When he wrote the letters he was infatuated. He was not exactly in love, he was infatuated. They were always together. He had meant nothing out of place when he wrote, "I will come to see you, trusting you mean all you say." They used to talk foolishly together, the same as other people did. He had never asked Mrs. Ross to steal money for him. He had never kissed Mrs. Ross.

Mrs. Sarah Jane Archer, the co-defendant's wife, said she remembered Easter Monday. Ross was at her house talking to her husband. Her husband said he was going down to Ross's hotel to look for two men. Ross said he was too lazy to walk with him, but went down with a cart scarcely three minutes afterwards. Next day Mr. Ross drove her home from the hotel, and then stood some time talking to her husband inside their house. Her husband was very fond of ladies' society, and spoke often very affectionately to other ladies in her presence. About two weeks before Easter Ross had asked her how a divorce could be obtained from his wife, and she said he "must prove a certain thing, but not by hearsay." He had asked her then how a woman could obtain a divorce, and she said that "in England she must prove violence as well as the other thing; but she didn't know the Cape law as to this."

Harry Richard Davis said he was at Archer's house on Easter Tuesday, when Ross came in and talked with Archer for sometime in a friendly manner.

After argument by counsel,

The Chief Justice said: In this case if there had not been certain letters written by the co-defendant to the defendant produced I must say I should have hesitated in finding that there was adultery between the defendant and the co-defendant. But these letters were clearly written, both of them, for an immoral purpose. There is no mistaking the meaning of both of them The object was to induce this young woman of seventeen to have improper intercourse with the co-defendant. No other object can be extracted from these letters. Well, that being so, the law would not require such very strict and conclusive evidence as to the actual adultery. I confess that the plaintiff's story seems very improbable. It seems improbable that the parties should have selected such an occasion and place for the purpose of committing this immorality. But at the same time the plaintiff's evidence is clear on the point, and the defendant admits it. The co-defendant, it is true, denies it, but his letters are very much against his denial. It is certain, in my opinion, therefore, that the adultery is proved. It is not certain that the plaintiff has suffered heavy damages. The plaintiff seems to have been very indifferent about the matter. After being told by his wife that there had been these frequent cases of adultery he thought to continue on good terms with the co-defendant, and even after actually seeing that there was immorality he was not very much shocked at it, and even on the following day took the co-defendant's wife home, and probably had a conversation with the co-defendant, as Mrs. Archer says. The co-defendant ought, however, to bear the costs of the action. I don't think there ought to be anything more than that. The adultery has been proved and admitted by the defendant, and the plaintiff, if he insists upon it, is entitled to a divorce. The Court will grant a decree of divorce and order the co-defendant to pay the plaintiff's costs in the action. The most inexpensive mode of effecting a division of the property will be made by ordering the plaintiff to pay £37 10s. to the defendant, and allowing her to keep the legacy of £75 that is to come to her.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. C. Silberbauer.]

GADIEGA v. EBRAHIM. { 1896. May 11th.

Jurisdiction—Magistrate's Court—Future rights—Ejectment—Action for rent—Act 20 of 1856, Section 10.

In an action for rent under a disputed lease it is not a valid ground of exception to the Magistrate's jurisdiction that future rights are involved if the rent for the premises for the whole period of the lease does not exceed the sum of £20.

In an action for ejectment, however, from the same premises he has no jurisdiction if it is shown to his satisfaction that the right to the occupation for the unexpired portion of the lease is to the defendant of the clear value of £40 *or upwards in terms of the last proviso to the* 10*th section of Act* 20 *of* 1856.

This was an appeal from the decision of the Resident Magistrate, Cape Town, in a case in which the appellant (plaintiff in the Court below) sued the respondent (defendant in the

Court below) for rent of and ejectment from certain shop premises belonging to the plaintiff.

Before the Magistrate the defendant excepted to the jurisdiction of the Resident Magistrate on the ground that the property was held under an oral lease for twelve months, and that future rights would be affected by a decision on this case. The Magistrate upheld the exception, after hearing the defendant on oath, without hearing the plaintiff. Against this decision the appeal was made.

The following were the Magistrate's reasons for allowing the exception:

The defendant has made a *prima-facie* case of future rights being involved in this question. He proved that the tenancy was for one year, and not a monthly one as alleged by the plaintiff. The Court was of opinion it could not enter into the case by hearing what the plaintiff had to say, as by so doing it would virtually try the question of the lease regarding which it had no jurisdiction.

The defendant also showed that the unexpired portion of the lease of the property as to which the right of resumption is in dispute, is worth to him more than forty pounds sterling. The Magistrate's jurisdiction is therefore ousted under section 10, Act 20, 1886.

Mr. Sheil for appellant.

Mr. Graham for respondent.

Before the Magistrate the defendant's evidence showed that he hired a room from the plaintiff for twelve months, paying a rent of £1 12s. a month, and carried on business therein, making, as he stated, a clear profit of £8 to £9 per month.

Mr. Sheil pointed out that the exception that future rights would be involved is taken under section 8 (sub-section 3) of Act 20 of 1856. Was the Resident Magistrate justified in holding that his jurisdiction is ousted without hearing plaintiff, as it would be far more equitable to do? In sales of, and servitudes, over land, the Court has held that though writing is not essential, yet clear and unimpeachable evidence is required. Surely so also in leases, yet the Resident Magistrate took only defendant's evidence on the point. His duty was to satisfy himself absolutely that there was a *bona-fide* exception. See *Grutzner* v. *Maddox* (3 H.C., 151); *Ghislin* v. *Syster* (Buch., 74, p. 57).

Mr. Graham relied on *Brady* v. *Michiel* (3 Juta, 178) and *De Jager* v. *De Jager* (3 Juta, 69). The Resident Magistrate was right, the procedure is simply for the Court to be satisfied that the counter-claim or defence is a *bona-fide*, not a bogus one. It has always been assumed that where there is a dispute as to the existence of a lease the Resident Magistrate's jurisdiction is ousted: *Le Roux* v. *Goldie* (5 Sheil, 392); **Bertram* v. *Wood* (3 Sheil, 167). As to the right of the Magistrate to order ejectment; what is the true test of the "£40 value" for the unexpired portion of the lease referred to in the proviso to section 10, Act 20 of 1856? Is it rental value or consequential damages? The Resident Magistrate assumed the latter and acted accordingly.

Court: Would it not be within the meaning of the proviso that if he could sell his interest for £40, or even if he can earn over £40 for the unexpired portion—it is of that value to him?

Mr. Sheil in reply urged that the earnings of £8 a month are personal profits, due to himself, his labour, enterprise, and skill as much as to the room where he carries on the business. The best test is the value of the goodwill—what it would fetch. It would also be a fair test to see what the parties agreed to pay in rent—as the mutual value to each. The case of †*Matthys* v. *Henning* (5 Sheil, 163) is not clear on the point.

The Chief Justice said: Exception was taken to the jurisdiction of the Magistrate, but in strictness the ground relied upon, that future rights are involved, is not applicable to the present case. If the defence were that the lease is invalid, then, on the principles laid down in *Bertram* v. *Wood* (3 Sheil, 167), a decision as to one or more months rent would be *res judicata* as to rent for subsequent months under the alleged lease and to that extent future rights might be bound. But the total amount of rent claimable under the lease is below £20, and the Mgistrate would have had jurisdiction if the whole amount had been sued for. He therefore clearly had jurisdiction in an action for part of the rent. But the action was also for ejectment from the leased premises. The question in dispute was whether the lease was for the full year or not. The defendant tendered evidence to prove that the right to the occupation of the premises during the period in dispute was to him of the clear value of £40 or upwards. The evidence was admitted, and then the evidence of the plaintiff was tendered with the view to show that there was only a monthly tenancy and that a clear month's notice had been given to the defendant. The Magistrate held that he could not entertain this evidence, as by so doing he would try the question of the lease regarding which he had no jurisdiction. For the reasons already given I am of opinion that this view was not correct, but the Magistrate went further and found that, according to the defendant's evidence, the unexpired portion of the lease was

* 10 Juta, 177. † 12 Juta, 130.

worth more to him than £40. It is not clear whether the plaintiff's evidence would have thrown any light on this matter, which was one peculiarly within the defendant's knowledge. It would perhaps have been the better course for the Magistrate to admit the plaintiff's evidence in order to ascertain whether it would throw light on the question of value, but I am not prepared to say that, under all the circumstances of this case, his omission to do so invalidates his judgment. Upon the evidence before the Court he was fully justified in holding that he had no jurisdiction, and the appeal must therefore be dismissed with the costs of appeal, each party paying his or her own costs in the Court below.

Mr. Justice Buchanan said: I concur that it is a question affecting the Magistrate's jurisdiction. But I myself upon the evidence would have had great difficulty in finding that the holding of the property was of the clear value of £40 as the Magistrate has found. We will not, however, upset the Magistrate's decision on a clear question of fact. No doubt the exception as taken in the Court below ought to have been overruled, but on the evidence before the Magistrate the appeal must be dismissed.

Mr. Justice Maasdorp concurred.

On the question of costs, the Chief Justice said: We are inclined to think that each party should pay his own costs at the Magistrate's Court, because the Magistrate ought to have overruled the exception, and was only justified in refusing to hear the case upon the additional evidence which was given (as to the *value*) by the defendant when he was being heard as to the term of the lease.

Appellant's Attorney, P. de Villiers; Respondent's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

DE PASS AND CO. V. J. A. LOUW. { 1896. May 15th.

Mr. Jones applied for provisional sentence on a promissory note for £40, with interest.

Provisional sentence granted.

MASTER OF THE SUPREME COURT V. OWEN'S EXECUTOR.

Mr. Sheil applied for an order calling upon the defendant S. H. Osler to file his account in this estate of which he was executor.

The order was granted.

ILLIQUID ROLL.

WORKERICH V. PETERS.

Mr. Joubert asked for judgment under Rule 319 for the transfer of certain property sold to the plaintiff under an agreement of sale.

Order granted.

REHABILITATIONS.

The application of Mr. Jones for the rehabilitation of Barend Jacobus Burger was granted.

A similar application by Mr. Smuts on behalf of Pieter Frederick Muller was granted.

Mr. Castens made a renewed application for the rehabilitation of John Priest. The application was made in November last, when leave was given to apply again in six months. That time had now expired.

Application granted.

GENERAL MOTIONS.

THE PETITION OF ANTONIE W. HEARN AND ANOTHER.

Mr. Buchanan applied for authority to the Registrar of Deeds to cancel certain mortgage bond for £350 passed by petitioners hypothecating one share of the farm Bloemshoek, in the district of Barkly East, the said bond having been duly paid off, but subsequently lost or mislaid.

The Chief Justice said: The order will be granted, but I do not like the statement that the bond had been filed at the Deeds Office, throwing thus the onus as to the loss on the Deeds Office, because I am satisfied that if the Deeds Office had received it there would have been some record of the receipt. But none of the books show that such a bond had ever been filed, and the petitioners and the attorneys have really been guilty of this negligence.

IN THE ESTATE OF THE LATE WM. MCWILLIAM.

Mr. Buchanan applied for authority to the executor dative of the said estate to transfer to the purchaser a certain piece of land at Amalinda, in the district of East London, sold by her in her said capacity without the assist-

ance of her husband, from whom she is separated, and whose whereabouts are unknown.

Order granted.

IN THE MATTER OF THE ANTE-NUPTIAL CONTRACT OF JAMES DAY AND MARY A. BORSLEY.

Ante-nuptial contract —Trustees—Release—Substitution.

G. and C. were appointed trustees under the ante-nuptial contract of B. and D. After the death of C. the Court released G. from his trust on his applying therefor by reason of his absence from the Colony, old age, and physical infirmities.

This was an application on the petition of George Graham, of London (formerly of Port Elizabeth), which set forth that applicant was with one George Chalmers appointed trustee under the ante-nuptial contract in question, copy of which is annexed, which your petitioner prays may be considered as inserted herein.

The said contract was passed and executed at Port Elizabeth on the 13th day of November, 1856.

On the 24th day of March, 1884, the said Mary Alice Borsley died leaving no will.

There are two children of the said marriage, to wit, James William Day and Thomas Morris Day, both of full age, who are consenting parties to this present application.

Your petitioner's co-trustee, the said George Chalmers Smith, died in the year 1892 at Port Elizabeth.

No fresh appointment has been made. All the assets connected with the estate are invested in the Colony of the Cape of Good Hope.

Your petitioner for some time past, has owing to ill-health, and with the consent of the said James Day, entrusted the management of the estate affairs to the secretary of the Port Elizabeth Assurance and Trust Company (Limited) of Port Elizabeth.

Your petitioner is now in very infirm health, unable to see to write, and wholly unable to attend to business, and moreover is unable to return to the Colony. For these reasons your petitioner has requested the said James Day to consent to his retirement from the aforesaid trust, which consent has been given.

The petitioner therefore prayed that the Court would grant an order releasing him from the said trust on the grounds of ill-health and non-residence in the Colony, and to appoint in his place and stead William John Craven, in his capacity as the secretary, or the secretary for the time being of the Port Elizabeth Assurance and Trust Company (Limited) of Port Elizabeth.

Mr. Sheil moved.

The Court granted the application as prayed.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

VAN NIEKERK V. FLEISCHER. { 1896. May 15th.

Mr. Close applied to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent for the recovery of the balance of money alleged to be due in respect of certain trading expeditions.

The respondent, who did not appear, had written to the Registrar stating that he was old and sick and himself a pauper.—Counsel stated that inquiry would be made as to respondent's circumstances before the action was actually instituted.

Order granted.

MASKEW'S EXECUTORS V. TRUTER'S EXECUTORS.

This was an action for declaration of rights.

Mr. Searle, Q.C., appeared for the plaintiffs.

Mr. Smuts appeared for the two first-named defendants, and asked that the bar be removed and that they might have leave to plead.

There was no objection to this, and after the rest of the defendants (who were not represented by counsel) had been called, the case was postponed until the first week of next term by consent of both parties.

THE PETITION OF ANDREW G. H. TEUBES. { 1896. May 15th.

Execution of judgment—Attachment—Sale of life interest—Notice.

Mr. Jones applied for an order declaring executable in respect of a judgment of this Court, dated 1st August, 1895, against David P. Burger and his wife certain life interest and eventual right to money in the farms Running Stream and Goree in the district of Robertson, a writ of execution against their goods and chattels not having produced sufficient to satisfy the said judgment.

The Chief Justice said: The sum due is but a small one, and the Court is not prepared to make such an order without notice having been given to the defendants. The application may be renewed after such notice has been given.

THE PETITION OF HENRY STEVENS.

Transfer duty—Sale of land—Cancellation—Act 5 of 1884, section 18 Procedure.

A. *sold land to* B. *for* £300, *receiving* £200 *on account. Transfer was never passed and* B. *left the Colony and could not be traced.*

The Court, *on the application of* A., *granted a* rule nisi *calling on all persons to show cause why the sale should not be cancelled on* A.'s *depositing with the Master the sum of* £200 *so paid on account less any costs the Court might order to be deducted.*

This was an application on the petition of Henry Stevens, of Krugersdorp, in the South African Republic, which set forth:

That your petitioner is the registered owner of Trading Station, No. 16, Governor's Drift or Hanglip Drift, in the district of Herschel, granted to him by deed of grant dated 1st December, 1886.

That soon after the date of the aforesaid deed of grant, to wit, about nine years ago, your petitioner sold the said trading station to one W. W. Smith for the sum of three hundred pounds and the said W. W. Smith paid your petitioner the sum of two hundred pounds on account of the said purchase price, and took possession of the deed of grant and other papers in connection with the sale of the said property.

The sale of the said station to the said W. W. Smith was never completed and he has never paid the balance of the purchase price to your petitioner.

Since the sale and soon thereafter the said W. W. Smith went away, and your petitioner verily believes left this colony, and your petitioner has never heard of him since. Every inquiry has been made to ascertain the whereabouts of the said W. W. Smith but without success, and it is believed that he went away many years ago to the interior of Africa and there died. No trace whatever can now be found of him.

Shortly after the aforesaid sale to the said W. W. Smith, of the said trading station, your petitioner left same, leaving there one Reuben Revill, who has since occupied the said property and paid all outgoings in respect of the same, including the annual quitrent of ten pounds, and is now in possession of same.

The moneys spent by the said Reuben Revill, on or in respect of the said property during the many years he has been in possession of same, amount to a considerable sum.

Your petitioner is now desirous of selling to the said Reuben Revill his interest in the said property, and the said Reuben Revill is desirous of purchasing such interest in order to get transfer of the said property into his own name, and terms have been agreed upon between your petitioner and the said Reuben Revill that he shall pay to your petitioner £50 in lieu of the £100 balance of the purchase price owing to your petitioner as aforesaid, and give an undertaking to indemnify your petitioner against any claims that might hereafter arise in respect of the said property, with which your petitioner under the circumstances is satisfied.

So many years having now elapsed since the aforesaid sale to the said W. W. Smith, and the same never having been completed the same had become null and void, and your petitioner is anxious to pass transfer to the said Reuben Revill, but is unable to do so without the assistance of this Honourable Court.

The petitioner therefore prayed:

1. That the Court would grant a rule *nisi* calling upon the said W. W. Smith to show cause why the aforesaid sale to him should not be cancelled.

2. That in the event of no sufficient cause being shown to the contrary the Court should cancel the aforesaid sale and to direct that transfer of the said property do pass to the said Reuben Revill.

The Registrar of Deeds reported as follows:

Should the contract of sale be set aside or cancelled, or declared or made void by the judgment of the Court, the transfer duty, if unpaid, shall not be payable, and if paid shall be returned (*vide* section 18 of Act No. 5 of 1884). If however neither of these events happen, and the Court merely grants an order for the registration of the transfer in the name of Reuben Revill, duty will have to be paid on the first sale of £300 and also on the second, and as the consideration in the latter case cannot possibly represent the fair value of the property, such value will probably have to be ascertained by appraisement. As to the first sale the Civil Commissioner may, if he thinks necessary, receive duty upon the solemn declaration of the seller only, in consequence of the absence from the Colony or death of the purchaser (see section 12, Act No. 5 of 1884), dispensing altogether with any in lieu of that which should in the ordinary course be made by the latter. I have nothing to urge against the application in itself, but think that duty should be paid on both transactions.

Mr. Searle moved: The provisions as to the cancellation of sale are those in sections 20 and 21 of Act 5 of 1884. But section 18 contemplated

the Court cancelling sales, though of course the procedure there is on action. Section 32 provides only for cases where no part of the purchase price has been paid. The simplest procedure in this case would be by way of the rule *nisi*. But it is hard that we should have to pay duty on both transfers. Even if the Court grants the rule, yet on the return day it might have to direct summons to issue for an action.

The Chief Justice said: Strictly, this application ought to have been by way of summons and action. The Court will, however, grant the rule now, but should there be any appearance on the part of the respondent, the Court will then still have to decide whether pleadings should not be filed. But at present it does not seem as if he would appear. The Court will grant the rule calling upon W. W. Smith and all other persons concerned to show cause on August 31 next why the sale of the land mentioned in the petition should not be cancelled, the petitioner undertaking on the cancellation to pay to the Master of the Supreme Court, for the benefit of the said W. W. Smith or other persons concerned, £200, less any costs he may be ordered to pay; the rule to published once in the "Government Gazette," once in the "Northern Post," and to be served on Reuben Revill.

[Applicant's Attorneys, Messrs. Van Zyl & Bulsinné.]

THE PETITION OF ELIZABETH L. C. CLARK AND OTHERS. { 1896. May 15th.

Donation—Prohibition of alienation—Transfer—Practice.

A. gave land to his children by a deed of gift containing a bare general prohibition of alienation. The Registrar of Deeds refused to pass transfer of a portion of the land subsequently sold.

The Court *on the application of the donees granted leave for the sale of the land and ruled that applications must be made to the Court for its consent in similar cases.*

This was an application by Elizabeth L. C. Clark (born Corbitt), and others on a petition which set forth:

The petitioners are the owners of certain property with the building thereon at Green Point, Cape Town, which was given to them by deed of gift subject to certain special conditions.

Two of your petitioners are occupying the premises on the said property but these are becoming dilapidated and are badly in need of repair.

The petitioners wish to put the premises in proper repair but cannot for lack of funds, a competent builder estimating the sum required at £50.

For the purpose of raising funds to place and keep the premises in repair, they wish to sell a small portion of the ground (140 x 112 feet), donated to them as above, situate at the back of the premises, for which they have been offered between £300 and £400.

The Registrar of Deeds however refuses, on account of the condition in the deed of gift, to register the transfer of the said land.

The petition prayed for an order authorising them to sell so much of the land as they may think fit, and authorising the Registrar of Deeds to register the transfer.

The Registrar of Deeds reported as follows:

The transfer in distinct terms prohibits the mortgage or alienation of the property and I am therefore not prepared to register a transfer of or a bond on the property without an order of Court. My decision is supported by the judgment of the Supreme Court in the petition of *F. J. Naude and Wife* (1 Sheil, 283). In that case the property was not to be sold, made away with or mortgaged, so long as the heirs might be living, whilst in this the children are not at liberty to hypothecate or alienate the land.

The deed of gift provided that "the property shall be possessed by his said children . . . and also that they shall not be at liberty to mortgage, pledge, hypothecate or alienate the said property."

Mr. Sheil, for the petitioner, said that all the heirs were before the Court. Counsel had been asked to get the Court to lay down a general rule for the guidance of the Registrar in these cases where the condition in the donation is void.

The Chief Justice said that the order asked for in this case would be granted, but no general rule would be made. Application must be made to the Court in these cases.

[Applicant's Attorneys, Messrs. Van Zyl & Bulsinné.]

QUEEN V. LOOTS. { 1896. May 15th.

Criminal appeal—Eastern Districts Court—Remittal of case—Reduction of sentence.

The Eastern Districts Court, on an appeal against a criminal conviction, quashed the conviction on two counts, and made an order remitting the case to the Magistrate for the purpose of passing such sentence as he would have passed if the accused had been

convicted only on the third count. The Magistrate thereupon, after due notice to the accused, passed sentence for the payment of a fine of £6 in lieu of the fine originally imposed, viz., £10.

Held, on appeal *to the Supreme Court, that the Eastern Districts Court had the power to make the order and that the Magistrate had jurisdiction to give effect to the order*

This was an appeal from the conviction of the accused before the Resident Magistrate of Britstown on a charge of contravening the provisions of sections 9 and 10 of Act No. 20 of 1894.

Mr. Schreiner, Q.C., appeared for the appellant.

Mr. Sheil, Assistant Law Adviser, appeared for the Crown.

The accused first appeared before the Court charged under three counts:

Firstly, that on the 26th day of November, 1895, and 21st January and 4th February, 1896, at Rooidam, in the district of Britstown, he unlawfully refused to allow Mr. Zacharias Grove-Inspector of Sheep for the Field-cornetcy, to examine his sheep, but obstructed him in the execution of his duty.

Secondly, that on the 21st day of January, 1896, and at the same place, he unlawfully refused to allow Mr. Fuller, the Assistant Scab Inspector for the district (acting under the authority of the Chief Inspector of Sheep), and Mr. Z. Grove to examine his sheep, and also obstructed them in their duty.

The third count was as to similar conduct to Mr. Fuller on the 4th February.

He was found guilty on all counts, and fined £10.

Against this conviction an appeal was made to the Eastern Districts Court, which resulted in the Court ordering the sentence to be quashed, and the convictions of the second and third counts to be quashed, and ordered that the case as to the first count should be returned to the Magistrate for a fresh sentence.

The following was the exact form of the order made by the Eastern Districts Court:

"The Court ordered the *sentence* to be quashed, also the *convictions* on the second and third counts to be quashed. The Court also ordered that the conviction on the first count be for refusing to allow the Inspector (Grove) to examine the accused's sheep on 26th November, 1895, and 21st January, 1896.

"It is further ordered that the Magistrate pass sentence upon the accused for contravening section 9 of Act No. 20 of 1894, in having in November, 1895, and January, 1896, committed the acts charged in the first count only."

Thereafter, on the 12th March, 1896, the accused was warned to and did appear before the Resident Magistrate to receive sentence accordingly. Before the Resident Magistrate passed sentence, Mr. Duggan the agent for the accused, filed the following objection:

"That the Magistrate having passed a sentence concerning *inter alia* the first two acts of refusal mentioned in the first count of the summons, which counts so far as these acts were concerned were sustained on review as a good conviction, the Magistrate is *functus officio*, and cannot pass another sentence on that conviction, and the Eastern Districts Court had no jurisdiction to remit a case for this purpose after quashing the whole sentence."

The Magistrate overruled the exception, fining the accused £6: and against this sentence appeal was made.

Mr. Schreiner said that the appeal was not against a judgment of the Eastern Districts Court though that might incidentally come into question: but it is against the Resident Magistrate's sentence of £6 inflicted in pursuance of an order of the Eastern Districts Court. The simple point is that the Eastern Districts Court drew a distinction between quashing a sentence and quashing a conviction. But the Resident Magistrate having exercised his discretion and passed a sentence, he was *functus officio*.

The Chief Justice: Instead of saying "we quash the sentence" the Eastern Districts Court might have said "we reduce it to whatever the magistrate awards." Their form of expression was awkward.

Mr. Schreiner: But that is just what they do not do. Besides, we contend that the procedure should have been by way of review. But what actually happened was this: the summons contained three counts: the Eastern Districts Court quashed the second and third counts and then proceeded to fuse the first and second count, or at least inserted in the first count a charge which was not in the first count in the summons.

The Chief Justice: Yes, but it was so laid on the charge sheet.

Mr. Schreiner: In any case if the sentence of £10 is quashed that for £6 cannot be reimposed, as the greater includes the less (*Regina v. Smith*, 4 H.C. 481). Now the review procedure is under Act 20 of 1856; the appeal procedure is under Act 21 of 1876. The latter Act specifically imports into appeal proceedings part of the procedure prescribed for review

under Act 20 of 1856; but *only* part, viz., the provisions of section 47 of that Act as to the carrying out of the sentence. Now sections 48 and 49 provide that cases which have come for review may be remitted to the Resident Magistrate, and there is thus a *continuing* jurisdiction: but they are not imported into Act 21 of 1876. There is therefore no power to remit on appeals.

The Chief Justice: If this case had been set down for argument under section 49 the Eastern Districts Court could have remitted, as it has done.

Mr. Schreiner: Yes, but it was not so set down, the proceedings were all taken under Act 21 of 1876. If it had been set down for review it would have had to be done on one of the review grounds laid down in section 5 of Ordinance 40 of 1828. The Court was evidently misled through not noting the marked distinction between appeal and review proceedings. The order of the Eastern Districts Court might have been consistent with justice, but not with law. But even if sections 48 and 49 be intended to apply, the real point is that the Resident Magistrate having passed his sentence cannot revive proceedings which have been quashed. The plea of *autreforis convict* is then a bar.

Mr. Sheil argued that the judgment of the Eastern Districts Court must be taken as a whole. If so it is clear that the Court never intended to quash the entire conviction. The Resident Magistrate passed a globular sentence of £10 on the three counts. They intended to remit to the Resident Magistrate to apportion. Counsel for appellant having practically admitted that there is clear proof of guilt under the first count, the accused was not in any way prejudiced by the order of the Eastern Districts Court. The £10 fine though passed as a globular sentence on the three counts might have been given on the first count alone, and it is not for the accused to except when a valid sentence has been reduced.

The Chief Justice said: Although the criminal jurisdiction conferred on Resident Magistrates by the 42nd section of Act 20 of 1856 is stated to be without appeal or review, this statement must be taken with the qualifications introduced by subsequent sections of the Act. The 49th section, for instance, provides a means by which a convicted person may appeal against a conviction where the record has been forwarded to the Registrar of the Supreme Court under the 47th section. Even where there is no such appeal the judge before whom the record has been laid may lay the same before the Supreme Court, and the Court then has the power, under the 48th section, to remit the case to the Magistrate's Court, with such instructions relative to the further proceedings to be had in such case as the Court shall think fit. This power has been continually exercised by the Court in appeals under the 49th section. The 4th section of Act 21 of 1876 extends the right of appeal to all criminal convictions, and in the determination of all appeals under this Act this Court and the Eastern Districts Court have the same power as that conferred on the Supreme Court by the 48th section of Act 20 of 1856. It is not quite clear under what Act the first appeal now in question was brought before the Eastern Districts Court, but under whichever Act it was, that Court, in my opinion, had the power to remit the case to the Magistrate's Court with instructions to pass such sentence on the appellant, not exceeding, of course, the original sentence, as would have been passed in case he had been acquitted on the second and third counts and convicted only on the first. The only difficulty which arises in this case is in regard to the true construction of the order of the Eastern Districts Court. The order reads thus: "The Court orders the sentence to be quashed, also the convictions on the second and third counts to be quashed." If it had stopped here Mr. Schreiner's contention that the quashing of the sentence prevents any part of it from being re-imposed would undoubtedly be good. But the order proceeds: "That the convictions on the first count be for refusing to allow Inspector Grove to examine accused's sheep on 26th November, 1895, and 21st January, 1896," and that the Magistrate pass sentence on the accused for these two contraventions of the 9th section of the Act. It is clear from this that the Court confirmed the conviction on the first count in respect of two contraventions of the 9th section and ordered the sentence to be quashed in part only. The order was made in favour of the prisoner in order to enable the Magistrate to reduce the sentence to what it would have been if the conviction had been a proper one in the first instance. The Magistrate accordingly reduced the sentence from £10 to £6, and the latter sentence is now appealed against. For the reasons already stated I am of opinion that the Eastern Districts Court had the power to make the order and that the Magistrate had jurisdiction to give effect to the order. The appeal must therefore be dismissed with costs.

Their lordships concurred, Mr. Justice Buchanan saying: I can only say that this difficulty has arisen because of a not very careful use of language in making out the order of the Eastern Districts Court.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

COURT v. ADOLPH ROSENTHAL AND CO. { 1896, May 18th.

Delivery—Warehouseman—Agent—Remuneration—Custom.

The warehouseman of certain bales of wool at the request of the sellers sent to them a transfer return acknowledging that he had received the wool specified in the return from such sellers on account of the purchasers. The terms of the transfer return were communicated to and acted upon by the purchasers.

Held, *that there was a complete delivery of the wool to the purchasers.*

After such delivery the warehouseman sewed, re-marked, and loaded the bales at the request of the purchasers, who knew that for this work the warehouseman intended to claim reasonable remuneration.

Held that, *although it had been proved that it was the custom of other warehousemen to include remuneration for such work in their charge against the sellers, the warehouseman was entitled to claim it from the purchasers who had employed him with full knowledge that he did not intend to abide by that custom.*

This was an appeal from the decision of the Port Elizabeth Circuit Court, in a matter which came originally before the Circuit Court on the 10th day of March, 1896. The summons stated that:

1. Between the 5th day of July and the 17th day of September, 1895, the plaintiff, at the special instance and request of the defendants, pressed certain wool and mohair and re-weighed, re-marked, sewed up, and loaded on wagons for transmission elsewhere the various bales of wool and mohair in the possession of defendants at plaintiff's warehouse, as more fully set forth in the account hereunto annexed marked A, which account plaintiff prays may be regarded as inserted herein.

2. Plaintiff is entitled to remuneration from defendants for the services so performed at the rates charged in the said annexed account marked A, which charges are fair and reasonable.

3. Plaintiff expressly notified to defendants before executing their aforesaid orders that he would make the said charges claimed.

4. Though frequently requested to pay the full amount due, defendants have failed and neglected to do so.

Wherefore the plaintiff prayed: (*a*) Judgment for £70 3s. 8d., with interest *a tempore morae*; and (*b*) general relief and costs of suit.

For a plea the defendants said:

1. Save and except as hereinafter is admitted, the defendants deny every allegation of fact and conclusion of law in the plaintiff's summons contained.

2. The defendants admit that the plaintiff performed certain work for them, to wit, the work referred to in items 1, 3, and 5 of the plaintiff's account annexed to the summons, and amounting to the sum of £56 17s.

3. Before action brought the defendants tendered, as they hereby again tender, to pay the said sum of £56 17s., less discount at the rate of 2½ per centum, or the sum of £55 8s. 7d. net.

4. The said tender is a good and sufficient tender, but the plaintiff has refused to accept the same.

5. With reference to the balance of the said claim, to wit, £13 6s. 3d., being items 2, 4, and 6 in the plaintiff's account, the defendants deny that the plaintiff has performed any work for them in connection with the same.

6. The defendants further say, with reference to the parcels of wool referred to in the said last three items, that the said parcels of wool were, before and at the dates referred to in the account the property of certain wool-sellers in Port Elizabeth, to wit: Hirsch, Loubser & Co., Stewart & McDonald, the plaintiff Philip Wathen Court, and Walter MacFarlane, respectively, having been deposited for valuable consideration by the said sellers for safe keeping in the warehouse of the plaintiff.

7. Before the said respective dates the said parcels of wool were sold by the said sellers to the defendants, but were not delivered.

8. On the said respective dates the plaintiff, acting as the agent of the respective sellers, delivered the said parcels of wool to the defendants.

9. The charges made in the said three items by the plaintiff are charges connected with the delivery of the said parcels of wool by him acting as the agent for the respective sellers to the defendants.

10. The defendants submit that they are by law entitled to receive delivery of the said wool free of all charges.

11. The defendants further say that by the usage of the trade at Port Elizabeth the delivery of wool to purchasers under circumstances similar to those aforementioned takes place free of all such charges as those claimed by the plaintiff.

12. Wherefore the defendants pray that plaintiff's claim, save and except as to the amount of £55 8s. 7d., hereby tendered, may be dismissed with costs of suit.

For a replication the plaintiff said:

1. The plaintiff admits a tender of £55 8s. 7d., but says it is not sufficient.

2. The plaintiff joins issue with the defendants on their statement of defence to the claim for the sum of £13 6s. 3d., and again prays judgment with costs.

Upon evidence led, and after hearing argument of counsel on both sides, the Court gave judgment as follows: The defendants' tender must be held to be sufficient. Judgment for the plaintiff for the amount tendered—the plaintiff to pay the costs of suit.

The following were the reasons of the Judge President of the Eastern Districts Court before whom the action was tried: I find that the admitted tender of £55 8s. 7d. is sufficient, and that the defendants have proved their plea. The plaintiff is not entitled to recover from defendants the balance of £13 6s. 3d. claimed in his summons. The attempt on the part of the plaintiff to annex a condition to the contract of bailment, by which the purchasers are bound to return to the warehousemen the wool after being washed for the purpose of pressing it, has not been successful, and the evidence shows that for the sum of 6d. per bale the plaintiff undertook, in his agreement with the seller, to receive, carry in, make return of the wool, store it for a reasonable time, make a second return, sew up bags cut while in his custody, re-mark, and put them on the wagon for delivery to the seller. This agreement the plaintiff attempted to disturb when he discovered that defendants as purchasers were not prepared to return the wool to them for pressing after being washed by imposing upon defendants an obligation to pay the extra charges now claimed. But it is, I think, clear from the evidence that defendants had refused to recognise any right in the plaintiff to depart from his original obligation, and called upon him as the agent of the sellers and only in that capacity to deliver the wool. This delivery had not taken place until it was placed on the wagon for removal to Uitenhage. This question of delivery is in some respects the most important point in this case. I do not consider that transfer returns No. 22 and No. 23 constituted delivery to the purchaser. These documents do no more than identify the wool sold to the defendants. It is this misapprehension on the part of the plaintiff which has caused him to regard himself as a trustee for the defendants, and to attempt to alter the relation in which he stood as bailee. It is quite possible that the charge of 6d. per bale would not adequately remunerate the plaintiff for his work, including re-marking and delivery, unless the wool were returned to him for pressing, but when he discovered that this wool was not in every instance so returned he could have protected himself either by increasing the charge against the seller from 6d. to a larger amount, or by contracting with the original bailor that in case of sale such bailor should as seller pay or secure him extra payment for delivery to the purchaser. Instead of this the plaintiff has endeavoured to force the purchaser into an obligation to pay for work which it was the duty of the seller to have performed. If it be said that the re-marking is essentially for the benefit of the purchaser and was no part of the duty of the seller, it will be seen from the evidence of the plaintiff himself that he told Mosenthal that he declined to deliver unless Mosenthal agreed to return proceeds to plaintiff's store or to pay plaintiff's charge for delivery, and that in future he would require to be paid his charges for delivery. No mention was then made of any charge for re-marking which seemed to have become an incident in connection with delivery; and was not claimed by plaintiff as a charge distinct from delivery for work done or to be done for the plaintiff's benefit. The only evidence approaching to any special request by defendants upon plaintiff to re-mark is in annexure No. 25 in the words "Please send to wash 16 bales greased wool to Union Works 100 similarly 14 bales over 101." It may be said the defendants requested plaintiff to put a "diamond," on bales as their distinctive mark, and this work plaintiff was not bound to do for defendant without compensation. An answer to this may be that defendants called upon plaintiff to do this as agent for the sellers as part of the obligation to deliver, and that therefore plaintiff should have refused to do the work unless he did so as seller's agent, and having done so, he must be regarded to have done so as seller's agent, and, moreover, that the usage of trade which plaintiff knew defendants relied upon obliged plaintiff to do so without charge. In addition to this we have plaintiff's own evidence, say-

ing: "I charged defendants 6d. and 3d. for loading up with my men and mending bales cut for obtaining samples." Nothing here is said about re-marking, and we find, moreover, that in the original account annexed to summons sewing is charged 3d. and marking and loading 6d., which shows that the 3d. is not meant to cover anything but sewing, while the contention in argument is that 3d. is charged not for sewing but re-marking, an argument which endeavours to meet the obvious difficulty under which plaintiff would labour, seeing that both sewing and loading are duties clearly imposed upon the seller. We may, therefore, come to the conclusion that even if marking was done at request of defendants and was not covered by the 6d. paid by the seller, there was no intention on part of plaintiff in this action to make any claim for such marking. Plaintiff's real contention in this case seems to be that the wool, being held by him as bailee for defendants, he could, unless debarred by contract, claim from the defendant compensation for any work done in connection with this wool, and that this sewing, marking, and loading was such work for which 9d. would be reasonable compensation. In my opinion plaintiff was debarred by contract with seller from making this charge at all, inasmuch as this work had already been paid for in the original 6d., and in addition to this even if it had not been paid for such sewing and loading were charges to be made by plaintiff not against the buyer but against seller; while as to the marking even if it is not covered by the 6d. paid by the seller it was work done by plaintiff when he was treated by defendants as agent for the seller, and that for this marking no special charge was ever intended to be made by plaintiff, as his own evidence and account annexed to summons show.

From this judgment the plaintiff now appealed.

Mr. Innes, Q.C. (with him Mr. Castens), for the appellant.

Mr. Schreiner, Q.C. (with him Mr. Benjamin), for the respondents.

Before the Circuit Court the following evidence *inter alia* was given:

Philip Wathen Court: I am plaintiff in this suit, and carry on business in Port Elizabeth as a warehouseman and wool presser, and have done so at least sixteen years. At present, when I receive wool from the consignee, who represents the owner, I receive it, weigh it, and stock it, and then send a return of this to the consignee, and at same time make an entry in my books of a copy of that return. I then charge 6d. per bale for this carrying, weighing, and stocking. I charge no rent for storage. The wool lies in my store for various times varying from a few days to many weeks.

The wool lies there for inspection by intending purchasers, who often make holes in the bags and take out samples. If any wool is sold I am requested by the consignee to give a return in favour of the purchaser—No. 21 being the sample of such return—that I send to the consignee and in my books keep a copy of that return.

If that purchaser wants it washed, he sends me an order to send it on to Uitenhage. I then load up the wool on wagons and send the wool to the station. If requested, I re-mark the wool as requested, but frequently it is sent off to the washer with its original marks only. If the wool has been pulled about, I can't send it off without mending the bags, and therefore mend them. If I send them off under the original numbers, I should not charge anything for the sewing. This would be included in the 6d. which I shall hereafter mention. The sewing is necessary in many cases.

Some years ago I always charged for sending to the wash 6d. a bale, and that I charged against the person who ordered me to forward to the washer, and formerly I did not resew except in bad cases. I did this for several years, but afterwards we abandoned that charge, because it was understood that the wool so sent to the washer would come back to us to be pressed in preparation for shipping, which was an advantage, as we got 2s. 9d. per bale less 2½ per cent. on scoured wool, and 3s. 3d. less 2½ per cent. on grease, and 3s. 3d. less 2½ per cent. on mohair.

This charge for pressing was practically the income of the warehouse where there was this press. The warehouse was really a pressing store, and there wool was pressed after the wool was received from the washer. The tacit understanding in all cases was that the wool was to come back to us from the washer for pressing, and it was really the charge for pressing that gave us the profit. During the last seven years I had therefore discontinued the second charge of 6d. for forwarding. Much of the wool stored in my warehouse is shipped direct without going to the washers. This wool is pressed in my stores before being shipped, and my charge for pressing, marking, and putting in order such wool is, if in grease, 3s. 3d. per bale, and 2s. 9d. for scoured. This is paid by the person shipping and ordering it to be pressed, who is generally not the person owning the wool when received by me. If there has been a sale while in my store, the buyer pays this while the seller pays the 6d. for storing and stocking. The 6d. and 3d. which I claim from defendants in this case

is included in the charge of 2s. 3d. or 2s. 9d. above. This is my practice. I have no personal knowledge of others' practice. I have no knowledge of No. 26 [A notice issued by some merchants at Port Elizabeth, see *infra*] and was not a party to it. I was not in business then, and I am unaware of its existence when I receive wool into my store.

It may be shipped with or without washing. The quantity sent to wash is far less than what is shipped direct. All that is shipped is as a rule pressed. I could not keep the stores without the charge for pressing—make the substantial profit out of pressing. I make no profit out of the 6d. charge on receipt. Several years ago I used to charge 6d. per bale for delivering wool for washing. I continued this about ten years. Finding that some other warehousemen did not make the charge, I waived it. I discontinued the charge, always presuming that the wool so sent to wash would come back to me. It came back. At any rate I always expected it back and looked that it came back. The number of bales representing the washed wool was always less than the unwashed. I always expect the equivalent back. If I had found a case in which no equivalent was returned I should demand it. Some cases did occur, and I brought it to the notice of the parties for whom the wool was washed, and they promised that the equivalent would come, Sometimes it did not. I know of no instance between six and seven years ago' and June, 1895, in which I charged the 6d. to the buyer—but the buyer preferred sending the wool back. There were cases in which the 6d. had not been returned and the wool not returned' My main profits were and are made from other general business. I believe generally the wool that was sent to be washed came back. On 6th March I found out that Hirsch Laubser had sold 678 bales warehoused with me to defendants. I received an order from defendants to send this wool on to Uitenhage to wash, having previously transferred them to defendants in my books. Before I sent the wool off I sent my storeman to defendants to know whether it would be returned. I had ascertained before this that defendants had stored their wool with Uppleby after it returned from Uitenhage, and that this was their practice. I sent the storeman to ascertain whether this would be done with the 678 bales. He brought me a message. I got back from Uitenhage only 50 of the bales for defendants. Between March and May last 214 bales warehoused with me were also sold to defendants.

About middle of June last, 426 more bales so stored we sold to defendants. Up to that time I had received only 50 bales back. I thereupon gave instructions that the 426 bales were not to be delivered until defendants either agreed to have the wool returned for pressing and preparation for shipment, or pay me my charges, which were 6d. per bale for delivery and loading, and 3d. per bale for re-marking and re-sewing, if required to be re-marked or re-sewn. If this were not required the only charge would be 6d. for delivery and loading. I went to the country and returning Loulser, of Hirsch Loubser, who had sold the 426 bales, advised me to see Mr. William Mosenthal, who represented the defendants in Port Elizabeth, and is the chief resident partner. I went immediately on a Tuesday morning in latter end of June. I went alone and saw Mr. William Mosenthal, who was also alone in his office. After some conversation about this matter Stephani and Goldschmidt came in. All talked to me. When I first came in I told Mosenthal that I declined to deliver the 426 bales unless he agreed to return proceeds to my store or agreed to pay my cha ges for delivery. He said, we have possession already. I said, they are still in my store. He said, "Your son promised to deliver them without stipulating anything." I said, "I will deliver and uphold my son's promise." I then said that in future I would require to be paid my charges for delivery. Only Mosenthal was present when I said this; he made no reply. He went to Murrel's office, who is the manager of the wool department. I went with him. I then asked Murrel if he had not promised me to send an equivalent back for the 678 bales. He said that he had only promised some wool back. I left. I am sure I told Mosenthal that in future I would make these charges. On 11th July, I sewed and re-marked 140 bales stored with me, and which had been sold to defendants. They were in three parcels; one of 30, one of 35, and one of 75 bales, and these appear in account "A" annexed to summons. Defendants gave me the order to send them to washers at Uitenhage. I did so. They were sewed and re-marked after defendant bought them. The 426 bales I know nothing personally about. I told Mosenthal that in future I would not deliver wool unless he paid my charge or agreed to return the scoured wool. He made no answer. He did nothing in reply. He did not say he assented. He may have said if I gave him official notice he would consider it—but I don't remember his saying so. Defendants always wished us to do work for nothing. I don't know what official notice in the letter means. He did not say that it meant a general notice by me to the trade. After Goldschmidt and Stephani left, Mosenthal was with me alone, and then I told him that I would in

future charge him the 6d: and 8d: unless the scoured wool was returned. I remember a purchase by Smerdon last week, I think from Milton, Watson & Co., of wools then lying in my store. The sale was cancelled. The sellers' agent, Christie, came to him and said that the purchasers threatened to cancel the sale if there was to be any charge against him for delivering or sending to wash. I said I should charge. Christie saw the justice of my charge, and he said, "Well, I shall cancel the sale," as they threaten rather than that "I (plaintiff) should be imposed on." I sometimes have wool lying in my store for months unsold. I have had two occasions where I have told the owner who had not sold to clear their stuff. The re-marking is a special business. It takes five men to do it quickly in rotation. There are five stencil plates. Marking and sewing together are charged 3d.

I am not aware of the practice of other warehousemen. I can only speak of my general practice.

Matthew Michael Loubser: I am partner in the firm of Hirsch, Loubser & Co., and we deal largely in wool in Port Elizabeth. We often sell wool consigned to us lying in warehouses here. The form of delivery is that on completion of the sale we write an order in the warehouseman's book to give us a return of the wool we specify in the book sold to the firm named. On receipt of that return we make out an invoice, which together with the return is sent by us to the buyer. The sending of that return by us I consider constitutes delivery to the buyer. The wools are sold in the stores and the moment they are transferred to the buyer we no longer have control over the wool, and the presser ceases to be our agent and acts as the agent of the buyer, from whom he takes his instructions as to the disposal of the wool.

If the purchase price is not paid I consider that I have no longer any control over the wools after they have been transferred to the buyer in the book of the warehouseman. Certainly the buyer could in such case take the wool out of the warehouse without payment. As a matter of fact wools are taken from the stores mostly before payment. As soon as the wools are transferred in the books to the name of the buyer, the warehouseman is at liberty to act on the instruction of the buyer without my consent. I remember Mr. Mosenthal coming to me about 426 bales of wool stored at plaintiffs, and which I had sold to defendants, and which plaintiff refused to deliver unless his charges were paid by defendants. Mosenthal did not threaten to cancel the sale, but he threatened to take legal proceedings against us to compel delivery without paying any charge to plaintiff. I told Mosenthal that I did not consider ourselves responsible for any delivery on the wagon, but I promised to see Mr. Court and to use my influence with him to get him to comply with Mosenthal's wishes. I saw plaintiff's son.

We are not buyers of wool. I have had some twenty years' experience in selling, and selling largely, and I think that up to a few years ago it was the invariable practice of buyers to return wool sent to wash from the washers to the store where they were bought.

Latterly I believe in some instances that custom has been departed from, but as a general rule the previous custom is still observed by many buyers.

Most buyers have no stores of their own, but I think they return the wool more because they consider it a custom than from any advantage, because they could have the wash done cheaper elsewhere. There are buyers who have warehouses and pressing machines of their own. I have known instances such as the case now in dispute, where wools have not been returned to the stores where they were bought.

It has not been customary as far as I know to charge anything for delivery to the wagon to the buyer. I know plaintiff has attempted to charge in two cases, one to Reiners Van Laer and to Uppleby. I was told by plaintiff in case of Uppleby that the charge was paid. In the other case instead of paying the charge the wool was returned to plaintiff.

This question has frequently cropped up during the last few years. Plaintiff is the only one that I have heard of that has attempted to make the special charge. In previous cases plaintiffs' demands have I believe been met by the buyers.

William Mosenthal: I am partner in defendants' firm. My knowledge as to the wool business only goes as far as the general principles. I remember the purchase of the 426 bales. I remember plaintiff refusing to deliver without our promising to return the snow-white. I went to see Loubser and said to him that we insisted on delivery of our wool which we had bought and were ready to pay for and he eventually went over to see plaintiff and we did receive delivery of those wools without my again seeing Mr. Court or paying any or promising any extra charge. Afterwards plaintiff came himself and saw me, and we had a general discussion. I put my views before plaintiff and he responded with his, but I all along maintained the position I originally took up, that he could not enforce from us a charge, which if he were entitled to make would have to be borne by the seller. Beyond this conversation I had no further talk with plaintiff. I can't remember the exact words

that plaintiff used, but he stated that he would make a charge in future, to which I replied that if such a charge were made that it did not in any way concern me as a buyer, but that if he gave me official notice (by which I meant an intimation in writing which could not be misconstrued) or publicly announced his intention to make such a charge, we might then be prepared to abide by the same if all other wool buyers were agreeable to do so also. Plaintiff gave me no written notice nor to the public that I know of.

I don't remember what plaintiff said would be the charge. He said that if the wool came back to him he would make no charge. I would not contradict him if he said 6d. in case the wool was not wanted to be re-marked, and 9d. in case of re-marking.

[On the 20th May, 1872, certain merchants of Port Elizabeth (amongst whom was *not* plaintiff's firm) issued the following notice:

"In consequence of the advanced rate in the price of hoop iron, wages, and other working material, the undersigned have from the 1st of June next, agreed to substitute the undermentioned charges for those at present existing:

Pressing per bale grease	...	...	3s 3d
" " washed	...	...	2 9

For receiving, weighing, re-loading, store rent for a *reasonable term* and including all other charges, per bale, 6d."]

Mr. Innes said that only £18 6s. 3d. was in dispute at Circuit Court, and now. The point is one of great commercial importance however The course of business as shown in the record was as follows: On the first entry of the wool to Court's warehouse, an entry is made in his books, *e.g.*, "Received from F. & L. 16 bales on account of Hirsch, Loubser & Co., on the 26th June," and opposite this entry is a column "How disposed of," under which figures the name of A. Mosenthal & Co., 3rd July, 1891. The wool, *i.e.*, remains until 6rd July, 1893, when there is an entry—"Return wanted for 16 bales to A. Mosenthal & Co." This is made in the "order book" in appellant's store by written order by Hirsch, Loubser & Co. Then the return form transferring the wool to Mosenthal & Co. is given accordingly on the date by Court, headed, "Return of 16 bales wool, received on account of Mosenthal & Co., from Hirsch, Loubser & Co.," and on that date there is a "bought note" showing purchase of that wool by Mosenthal. Mr. Murrell, indeed, manager of the produce branch of respondents, gave evidence that the "sending of the return to buyer does not constitute delivery, though not regarded as such it is only a list of marks and cases of the details not supplied on the invoice. Generally the invoice is sent with these returns." Also, he says that "the words in the return "Received on account of Mosenthal & Co.," are of no importance. I got it from Hirsch, Loubser & Co." The returns from other warehousemen are not in the same form as appellants'. It is common cause that the return is sent with the invoice on one day. Then on 9th July is the final dealing, a memo. is given "From A. Mosenthal & Co., to Mr. P.'s Court. Please send to wash 16 bales grease wool.—(Signed) A. Mosenthal & Co." It therefore remains for six days in Court's warehouse and after that is forwarded to the wash. This is the general course of business, save as to the 35 bales, the first item of the account, which stand on a different position to the rest of the bales. Court in regard to these 36 is in position of Hirsch, Loubser & Co., in regard to the 16 bales. Court being there an agent for sellers it was consigned to him and sold to Mosenthal on public market.

Mr. Schreiner: We will go on the general principle, we do not make anything of that point.

Mr. Innes: The facts are common cause. The first question is, when did the ownership in the wool pass to defendants? The dominium had passed some time before we got the wool. It was Mosenthal's wool, and if so he is responsible for the washing. The question of the delivery is one of the grounds on which Judge-President bases his decision. When did the delivery take place?

Mr. Schreiner: Legal delivery did take place, We admit that, but we say that no physical delivery took place.

Mr. Innes: Then it narrows itself down to this, were we bound to do the work for nothing? Now plaintiff was no party to the notice issued on 20th May, 1872, and denied that his custom was the same. In his evidence he states why he discontinued the charge of 6d. for forwarding, viz, on the tacit understanding that he should make his profit on the pressing to be made. The effect of the evidence is that for ten years he made the charge, for seven he did not, but finding Mosenthal not sending the wool to be pressed he gave notice that in future he would make the charge; "official" notice was indeed not given, for by our law no "official" notice is required. As Mosenthal admits he was owner; all he could have done was to remove the wool by his own wagons and men. But if Mosenthal thereafter ordered Court to do the work Court could not after the notice be expected to do it for nothing.

The Chief Justice: Yes, but although Mosenthal received the notice, did he not after receiving it tell Court to do the work: stating, however, that he would not pay for it but that the seller might?

Mr. Innes: Yes, but the correspondence clearly disposes of that as to item of the 119 bales, Court reiterating that he expects remuneration. So that even if Mosenthal was entitled to a written notice he at all events had it in regard to the latter and larger amounts on the account. The custom may be against us, but Loubser shows clearly that at least it was not Court's custom and Court denies he knew of its existence. Custom again applies only in default of special contract, and Court alleges there was a special contract.

Mr. Schreiner: The decision must turn on the way in which we regard the position of Court when he received the wool. A. the seller made C. his bailee under a contract to be judged of by the usage of trade. The seller is obliged to give *actual* delivery of the goods sold. (See *Voet* 16, 3, 4.) The custom in Port Elizabeth was clearly that indicated in the notice of the 20th May, 1872.

Mr. Justice Buchanan: But you rely on half a custom. The custom as a whole would be to get the goods sent back again to be pressed.

Mr. Schreiner: No, that might be a parallel custom, but his remedy would then have been to sue for damages for breach of the custom. But the main point is, what is the seller's contract with Court? The seller who deposits the wool with the bailee says, "when I sell the wool you must deliver it"—meaning thereby actual delivery. See *Anson on Contract* (p. 33. S.C. Library Edition). Mosenthal privity with Court comes in when Mosenthal is ascertained as the definite buyer. Mosenthal says, "I buy from the seller and you must notify the seller when you make the contract of deposit with him."

The Chief Justice: As to the seller's duty to deliver, is he bound to take it to the purchaser?

Mr. Schreiner: Clearly he must tender to the purchaser (*Voet* 19, 1, 10). The sewing is evidently an incident to the delivery, it being necessary to deliver the bales in good order. The sellers have made a contract (in the deposit) with the bailee on behalf of an uncertain person. This contract affects the whole matter up to the door of the warehouse.

There are two deliveries, there being two contracts. The delivery under the contract of sale took place at the moment the return was called for and sent with the invoice. The delivery under the bailment would be made at the door of the warehouse.

Now the usage is clear that from the year 1872 on there was a binding custom not to make the charge. To get out of it, Court had to give special notice not to Mosenthal but to the seller, *i.e.*, to the one with whom the contract of bailment existed. As to the relationship under such a contract between Court and Mosenthal see *Trademan's Benefit Society* v. *Du Preez* (5 J., 179); *Standard Bank* v *Union Boating Co.*, (7 J., 269) and *Standard Bank* v. *O'Connor* (6 J., 32). As to the contract between Court and seller we prove the custom: for Court to depart from custom on him lies the onus of proving special contract. The contract by Court with the seller is one on behalf of an unascertained third party—which becomes binding when the third party becomes ascertained.

The Chief Justice: That is not the defence in the plea.

Mr. Schreiner: The plea is not altogether clearly drawn, but the whole correspondence shows that it was the attitude taken by Mosenthal & Co.

The Chief Justice: With regard to the terms of the contract between the seller and plaintiff, see the evidence as to seller's attention being specially called to the point. And Loubser says, "I told Mosenthal I did not consider ourselves responsible for any delivery on the wagon." Surely he then foregoes the custom as to future sales, and future sales therefore after that conversation would not be under the stipulation as to delivery alleged by you.

Mr. Schreiner: I submit not. As to incidents annexed to contracts of bailment, and generally, see *Evans on Principal and Agent* (p. 254); *Addison on Contracts* (p. 290); *Broom's Commentaries* (pp., 11 and 13); *Voet* (1, 8, 29); *Ludolph* v. *Wegner* (6 Juta, 193); *Lenchars* v. *Cooper* (7 Carr and Payne 119).

Mr. Innes in reply urged that in the absence of stipulation in a contract the common law rule as to delivery is that he who wishes to enforce the contract must as plaintiff tender to complete before action, the seller to tender delivery or the buyer to tender payment. As to delivery of heavy goods, see *Pothier on Sale* (Part 5, chap. 1, page 198).

C.A.V.

Postea (June 10th).

The Chief Justice said: This is an action for work done by the plaintiff at the request of the defendants. The plaintiff is a warehouseman at Port Elizabeth and the work done by him consisted in sewing, re-marking and loading certain bales of wool of which he had the custody. The wool had been placed in his custody by the owners, who, on selling the same to the defendants, gave an order to the plaintiff that a transfer return of the wool so sold was wanted. Thereupon the plaintiff sent a return signed by himself acknowledging that he had received the wool specified in the return from the sellers on account of the defendants as

purchasers. The terms of this return were, I take it, communicated to the purchasers, for when they wished the wool to be removed from the stores they, in each case, sent a note to the plaintiff directing him to send the wool to wash, and indicating the mark which they wished to be put on the bales. The plaintiff then proceeded to sew bales which had been cut, re-mark all the bales and load them on to the railway wagons. It is this work done at the defendant's request in respect of which the plaintiff claims nine pence per bale. The defence is in effect that the work was done by the plaintiff as the agent of the sellers and that by the custom of the trade in Port Elizabeth, the delivery to the purchasers should be free of any further charges. The learned judge in the Court below held that in law the transfer returns did not constitute delivery of the wool to the purchasers, and that until the loading of the wool he continued to be the agent of the sellers. I regret that I cannot concur in this view. The law is well established that an agent having the custody of goods for one person may, on receiving proper directions to that effect, change the custody so as to become the custodian of the goods for a third person. The effect of such change of custody is to constitute delivery to such third person. In *O'Callaghan's Assignees* v. *O'Callaghan* (2 Juta, 126) it was held that where delivery has been duly made to an agent for the owner in his capacity as such agent, it is not necessary for the purpose of transferring the ownership to such agent under a sale of such goods to him, to make a fresh delivery to him. In the subsequent cases of *Standard Bank* v. *O'Connor* (6 Juta, 44) and *Standard Bank* v. *Union Boating Co.* (7 Juta, 257), the principle was extended to the case of an agent, who has the custody of goods for the owner, becoming the bailee for another person to whom the owner had sold or pledged the goods. The delivery was held to be complete as soon as the bailee on the owner's directions acknowledged that he held the goods on account of the purchasers, or the pledgee. In my opinion the effect of the transfer returns, at all events after they had been communicated to the defendants as the purchaser was (independently of any question as to the payment of the price, which does not enter into consideration here) to transfer the ownership to the defendants. After such transfer the plaintiff held the goods as their agent and was bound to obey their instructions in regard to the disposal of the wool. The delivery being complete the sellers could no longer be put to any expense in connection with the subsequent loading of the wool. At the defendants' request the plaintiff sewed, re-marked, and loaded the bales, and for this work the plaintiff is entitled to receive a reasonable recompense from the defendants as his employers. It is not contended that the charge in itself is unreasonable, but the learned Judge-President held that the plaintiff by his agreement with the sellers had undertaken to include the work now in question in the work to be done for the seller at the rate of sixpence per bale. Mr. Schreiner in his able and ingenious argument, has stated the proposition in a somewhat different way by contending that the sellers had stipulated on behalf of the purchasers that the plaintiff should not make the charges now in question. I have read and re-read the record and have been unable to find any trace of direct evidence to support such an agreement or such a stipulation. Loubser, one of the sellers, does not say a word about any undertaking that the plaintiff would not make the charges against the defendants. On the contrary, he says that when the defendants complained to him in June, 1895, that the plaintiff refused to deliver unless his charges were paid by the defendants, he (Loubser) answered that he did not consider himself responsible for any delivery on the wagon but would use his influence with the plaintiff to get him to comply with the defendants' wishes. This would not be the answer of a person who had made a contract on the defendant's behalf that they should be free from the charges. The only evidence from which such a contract can by any possibility be inferred is the evidence relating to the custom of the trade at Port Elizabeth. That evidence certainly showed that other warehousemen do not charge the purchasers anything after having received sixpence per bale from the sellers. The evidence also shows that the plaintiff had for a long time been content without the additional charge. But before the work was done to the bales now in question the plaintiff distinctly informed both the purchaser and the seller that he would make the charge if required to do the work. After receiving this information the defendants could have done the sewing, remarking and loading themselves, but they continued to intrust the work to the plaintiff. In August, 1895, there was a long correspondence between the parties which resulted in the plaintiff's refusing to load wool on to the wagons without remuneration for his work. To prevent a deadlock the defendants suggested that the wool should in future be delivered and that the question of their liability should be submitted to a committee of the Chamber of Commerce. Neither party appears to have been quite satisfied with the decision of the committee, and accordingly the case was brought before the

Circuit Court for decision. I am clearly of opinion that the defendants are liable to pay the plaintiff's charges in respect of wool dealt with after the defendants had clear notice that the charges would be made and would be insisted on. The custom of the trade could not compel the plaintiff to do the work for less than he demanded from the person who employed him with full notice of the charge. The sum of £7 0s. 3d. must therefore be added to the amount awarded in the Court below and judgment entered for the plaintiff for £62 8s. 10d., with costs in this Court and in the Court below.

Mr. Justice Buchanan said: I concur in holding that this appeal must be allowed, and the judgment of the Court below amended in part at all events. It is clear that as between the sellers of the wool and the defendants as purchasers, that delivery was effected when the plaintiff as warehouseman undertook to hold the wool on behalf of the defendants, and when the defendants accepted this undertaking. After this delivery the plaintiff became bailee for defendants. The defendants and they only could give instructions to the plaintiff as to the subsequent disposition of the wool. It has been contended that plaintiff was bound after the delivery to do certain things in connection with the wool over and above his duty as bailee, by virtue of his original contract with the sellers; and that it was competent for the sellers, on originally depositing the wool with plaintiff, validly to stipulate on behalf of any future buyer thereof. The record does not show that there was any such contract expressly entered into between the sellers and the plaintiff, but it is urged that such stipulations were implied by the usage of the trade at Port Elizabeth. This is not the way the issue is raised on the pleadings, nor is it the basis of the judgment of the Circuit Court. As I read the record, what is proved is that it was the practice for wool warehousemen not to make the charges sued for, as it was usual for the purchasers of wool to return it after washing to the same warehouseman to be pressed for shipment, and as the amount paid for this pressing afforded sufficient profit he was induced thus to forego further charges. The onus is on the defendants to prove the custom they rely upon. In my opinion they have failed to do so. But whether there is such a usage of the trade or not, it is clear that the plaintiff gave express notice to the defendants that he would in future make the charge sued for, unless the wool was returned to him for pressing. The wool was not so returned, hence this claim. It would appear, moreover, that the sellers, Messrs. Hirsch, Loubser & Co., also knew that plaintiff intended to charge. Under these circumstances the plaintiff is, in my opinion, entitled to recover for his work and labour done outside of his duty as bailee for defendants upon their order after he had given them notice that he would not do such work unless he was paid for it. The correspondence shows that the position taken up by the plaintiff was understood by both parties by the 30th August, at any rate, so that the items of the account after that date must be allowed.

Mr. Justice Maasdorp: I concur in the judgment. It seems to me that in one respect only in this case can a custom as contended be said to have been engrafted upon the common law by parties in their dealings with each other. The law is briefly stated by *Burge*, Vol. III., page 497, where he treats of the law of Scotland, which in this respect seems to be identical with our own: "Where goods are lying in the hands of a warehouseman at the time of sale the transfer of them in the warehouseman's book to the name of the buyer, by order of the seller, completes the delivery, it makes the warehouseman thenceforward the custodian for the buyer. The notice to the custodian operates as a transfer of the property. In the law of Scotland a transfer of the custody has always been held as effectual delivery to the buyer." It was in this light that the wool buyers, sellers, and warehousemen regarded their mutual rights and obligations, and no further delivery was considered necessary or was expected as between the sellers and buyers. That is, I think, what Loubser meant when he said, "I told Mosenthal that I did not consider ourselves responsible for any delivery in the wagon." It is quite certain that no sooner had the required returns been sent in than the buyers considered themselves entitled to give whatever instructions they pleased with respect to the wool purchased, and they ordered it to be forwarded by the warehouseman to the woolwashers or to be pressed by him for shipping. This work was done for the buyers at their own request. The only custom in the matter was the custom on the part of the warehousemen not to charge the buyers for the work done in forwarding to the woolwashers. And this was done because the warehousemen expected certain favours in return. When the plaintiff found that these favours were denied he resolved to break through the custom and to charge for the work done. This he had a right to do. Consequently he is entitled to charge for work done for the defendants at their request in forwarding to the wool washer, subsequently to his giving them notice that he intended to make a charge. Whatever may be said of the first two items, with respect to

which I also think the evidence admits of doubt, I think it is clear that before the work specified in the last item was performed the defendants had received distinct notice from the plaintiff that in his dealings with them he would not be bound by his previous practice but that he expected to be paid for his work. It is not said that the charge is unreasonable, and I think the appellant is entitled to receive payment.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorneys Messrs. Van Zyl & Buissinné]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

BOWER v. COLONIAL GOVERNMENT. { 1896. May 19th. „ 20th.

Public roads—Railways — Materials — Sir John Cradock's Proclamation—Water - Registration—Servitude—Quitrent land.

The Government has no right, under Sir John Cradock's Proclamation, to the water in a well sunk by the Railway Department in quitrent land for the supply of their engines as being a material for making and repairing public roads.

Permission granted by the owner of quitrent land to the Government to obtain water from any part of such land is not binding upon subsequent owners unless duly registered as a servitude upon such land.

This was an action brought by Edward Bower against Sir James Sivewright in his capacity as Commissioner of Public Works, and as such representing the Colonial Government.

For a declaration the plaintiff said (2) that he is the registered owner of a piece of quitrent land being portion of the farm Vlakkraal, in the district of Prince Albert. For some time prior to the year 1882, the said land belonged to one Duncan Wilson, who on the 6th July, 1882, transferred it to the plaintiff and one Henry Bower in equal undivided shares, and on the 19th December, 1894, the plaintiff obtained transfer of the share of the said Henry Bower.

3. A line of railway constructed, maintained, and worked by the Colonial Government runs over the said land, and the Prince Albert-road Station is situated thereon. There is also an hotel, the property of the plaintiff, built on the said land, which hotel was in existence during and before the year 1882. The said hotel is now and has been for some time past, leased by the plaintiff to one Branckmann.

4. While the said Wilson was the owner of the said land the Colonial Government wrongfully and unlawfully made certain excavations upon it for the purpose of obtaining water, and erected a pump for the purpose of pumping water from the said excavations into a tank at the railway-station, there to be used for watering engines and for other purposes.

5. Thereafter it was agreed upon between the said Wilson and the Government that the said Wilson would make no claim on the Government for water used by the railway, on condition that the Government laid a pipe from the tank at the station to the said hotel, and by means of the said pipe supplied from the water taken by it as aforesaid whatever water might be required for the purposes of the said hotel.

6. The plaintiff and the said Bower, when they purchased the said land, had notice of the agreement between the said Wilson and the Government, and the said agreement was thereafter confirmed between them and the Government.

7. Thereafter a pipe was laid by the Government as aforesaid, and for some time sufficient water was supplied at the said hotel in terms of the said contract, and the Government has since the year 1882 continued to use an ever-increasing quantity of water obtained from the excavation hereinbefore mentioned.

8. Since the year 1895 the Government had wrongfully and unlawfully failed and refused to supply such a quantity of water as was and is required for the purposes of the hotel, but has used and appropriated an excessive quantity of water for its own purposes; and the Government wrongfully contends that it is entitled to use all the water obtained as aforesaid on the plaintiff's land without supplying the said hotel or making any compensation to the plaintiff.

9. The said Brauckmann, who is the lessee of the plaintiff, has sustained considerable damage by reason of the wrongful conduct of the Government as aforesaid, and he holds and is entitled to hold the plaintiff liable in respect of

the said damages. He has also refused to pay rent to the plaintiff for the month of November as he has a right to do.

10. By reason of the premises and otherwise the plaintiff has suffered damages to the sum of £1,000, which the defendant neglects and refuses to pay.

The plaintiff claimed:

(*a*) An order declaring that the water obtained from the plaintiff's land as aforesaid is the property of the plaintiff, subject only to the terms of the contract hereinbefore referred to; (*b*) An order interdicting the Government from using any of the said water, unless and until it supplies at the said hotel a quantity of water sufficient for its requirements from time to time; (*c*) payment of £1,000 as damages; (*d*) alternative relief and costs of suit

In his plea the defendant, after admitting paragraphs 2 and 3 of the declaration, said: (2) That as to paragraphs 4 and 5, the defendant admits that an agreement with reference to the water taken for railway purposes from the farm Vlakkraal was come to between the Government and Duncan Wilson, but denied that the terms of the agreement are as set forth in the said paragraphs, and denies that excavations were wrongfully and unlawfully made on the said land during the time the said Wilson was owner thereof; (3) the defendant says that the excavations were lawfully made at a time when one Le Roex was owner of the said land, under an offer made by the said Le Roex and accepted by the Government, allowing the Government free water rights on the said land; (4) he says that the terms of the agreement between the Government and the said Wilson are fully set forth in two letters, one dated the 14th July, 1882, containing an offer from the said Wilson "to abandon all claims on the Government for the water used by the railway at Prince Albert-road on condition of an iron pipe being laid down from the tank at the station to the hotel to supply whatever water may be required there," and the other letter dated the 9th August, 1882, from the General Manager of Railways to the said Wilson in answer to the above, and accepting on behalf of the Government the offer contained therein.

As a claim in reconvention the defendant (now plaintiff in reconvention) stated that he is entitled to have it declared that subject to the terms and conditions of the agreement referred to in the plea the water obtained from the excavations on the plaintiff's land as set forth in the declaration is the property of the defendant.

The defendant therefore claimed in reconvention: (*a*) An order declaring that the water obtained from plaintiff's land as aforesaid is the property of the defendant, subject only to the terms of the said agreement; (*b*) alternative relief and costs.

The plaintiff's replication and plea in reconvention were general.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Graham), for the plaintiff.

Mr. Joubert (with him Mr. Sheil) for the defendant.

Mr. Duncan Wilson, residing at Worcester, said he knew the portion of ground on which the Prince Albert-road Station was situated. He leased it before 1882, and in that year purchased the farm. He kept a hotel and general store there. He transferred it a month afterwards to the two Bowers, but leased it from them for the two years following. From about 1880 to 1882 Mr. H. Bower managed the business for him. He had made an agreement with the Railway Department to the effect that if they supplied his hotel with water he would abandon all claims on the water. At that time he had already transferred the land, but negotiations had been proceeding for some time, and the Bowers knew of the agreement. Before that time he had had great difficulty in getting water, having to cart it from a neighbouring farm, at an estimated cost of £200 a year. He had not known that the Government had permission to take water from the farm given by the previous owner. After he had made an agreement with the Railway Department a pipe was laid, and he always got plenty of water from there so long as he remained at the hotel. There were always about thirty people living at the hotel excluding visitors, but he was never short of water. There was a small garden and small pond behind the house, the latter being fed from the tank at the hotel. On April 3 last he inspected the hotel at Prince Albert-road, and saw that four additional rooms had been added, and a small bathroom. There were 2 inches of water in the hotel tank—it had never been so low in his time. No water was run into the tank until between nine o'clock and ten o'clock next morning. There was very little water in the railway tank. Next morning the water in the tank rose five inches—about forty gallons—and in the afternoon two inches. Not more than seventy gallons ran into the tank all day. Since his time there had been trees planted and a garden laid out at the railway-station, watered from the railway tank. The total depth of the excavation in the railway well was about 10 feet, and there was 15 inches of water there when he examined it.

There was not now an adequate supply of water at the hotel. On the day he was there a cask of water had to be sent for. About 1,000 gallons per day would be the average requirement of the hotel in his time.

Cross-examined: In March, 1882, he bought the hotel from Le Roex. The well was then in existence, and the water was being pumped to the station. Previous to that correspondence, he had not got water from the well. It was because of his right to the water in the well that the agreement was made. By the agreement he understood that if there was not sufficient water for both the station and the hotel what water was obtained should be equitably divided—something like half-and-half he should say. He had found the water in the railway tank very low on April 4 when he went. There were about seventy bluegum trees at the station now which had not been there before. The pond at the hotel had been slightly lengthened since he saw it last, but there had evidently been no water in it for a long time.

Re-examined: He had never seen a well so shallow as that at Prince Albert-road Station. He had no doubt but that if the well was dug deeper more water would be obtained.

By the Court: He did not know why the plaintiff did not dig a deeper well than the Government and take the water.

Ferdinand Branckmann said he was the lessee of the property in question. He came there in 1884 as clerk to Mr. Wilson. In 1886 he hired the property. He would not have taken the hotel if it had not had a water supply. Until about a year ago there was a constant supply of water from the railway tank. In 1894 he made 40,000 bricks for the building of a church, and that was the only occasion on which he had used fresh water from the tank to fill the little pond behind the house. He had always tried to prevent a waste of water. His supply of water had run short since the new pumper came to look after the pump on April 1, 1895. He had now to cart water from his own farm, a mile and a half away. He had been informed that on account of the water failing at Grootfontein it was necessary for engines to take more water at Prince Albert, and consequently he could only have two hours' supply of water daily. He had seldom got two hours' water supply daily, frequently only getting about half an hour daily. If the railway tank was full, the water would flow from the pipe at about 90 gallons per hour. There were fifteen people permanently at the hotel. A new railway tank was now being built next to the other one.

Cross-examined: The railway officials had always had plenty of water to water their gardens when he had none. Except in the pipes to the station, the supply was turned off from the railway people's tanks at the same time that the hotel supply was turned off. On many occasions when he did not get his full hour s supply of water, the water was higher in the railway tank than the top of the inlet to the hotel pipe.

William Fowler said he had lived in the Prince Albert district for the past 17 years. There was an ample supply of water to the hotel tank until a year ago; now there was never sufficient water. The porters' and railwaymen's houses and gardens had always a good supply of water. He thought about 1 500 gallons of water per day was necessary for the hotel. Although the water from the hotel was turned off, there was a supply of water always to be had at a public tap in the station, where the general public could get water at any part of the day.

Maria Carelse, cook at the hotel, said that there was not now enough water for cooking purposes at the hotel tank. The landlord was very particular about not wasting any water, and no washing wa done there now.

Ferdinand Finke, clerk at the hotel, corroborated as to the scarcity of water now at the hotel. He had sometimes taken water from the public tap at the Railway-station to the hotel.

Henry Bower, brother of the plaintiff, said he had been Mr. Wilson's manager at the hotel many years ago. He had caused the writing of the letters to the Railway Department to get water from the railway tank. There had been a splendid supply of water at the hotel so long as he was there

Edward Bower, the plaintiff, said he had purchased his brother's half-share in the farm and hotel in 1894. A year ago there was a shortening of the water to the hotel, but the porter's gardens at the station were always well supplied. His property had deteriorated in value in consequence of the failure of the water supply. The hotel got a bad name.

Cross-examined: When he bought the proper y he was aware of the agreement between Wilson and the Government.

For the defence,

John Thos. Cooney, locomotive inspector on the Western system, said: From 1878 to 1885 he had gone up the country as the line advanced. He had seen the well sunk. It was six feet deep at first, and had been deepened two or three times. The deepening had not improved the supply to the well. The cost of pumping there was about £200 per year. The original cost of the pumping plant was about £450. In ordinary seasons the well yielded about 8,000 gallons of water per

diem. About six engines watered there daily, taking about 400 gallons each. In dry seasons it was sometimes impossible to get more than 1,500 or 2,000 gallons per day from the well. Under the proper working of the station time-table and all the engines taking water there, 4,000 gallons would be wanted for the engines alone. He had caused a stop-cock to be put on to the pipe supplying the hotel on account of the water being allowed to run into the pond at night from the hotel tank. Efforts had often been made to plant trees at Prince Albert, but on account of the scarcity of water they had proved generally a failure. The pond was about thirty feet by sixteen feet, and about a foot deep. At present the railway requirements for water at Prince Albert were greater than the supply.

Cross-examined: He was accustomed to visiting Prince Albert-road two or three times a month. He had often tested the well in dry seasons. In the wet seasons the well would yield 8,000 gallons of water during the twelve hours of daylight. It would not yield 16,000 gallons in twenty-four consecutive hours. No larger pump had been erected since the well was sunk. The pump would pump 1,500 gallons per hour. Prince Albert had suffered from the drought during the past years. He had not watched the water running from the hotel tank into the pond for any length of time, but just long enough to convince himself that the reports made by the pumper were true. No amount of care in pumping would make any difference in the amount that the well would yield. By there being less water at Grootfontein it was dangerous for "down" trains to pass Prince Albert-road without taking water.

Edward Chalmer, pumper at Prince Albert-road, said the weather had been very dry during the twelve months he had been there. The water from the well was not sufficient for both the railway and the hotel He could pump the well dry in the morning in an hour and a half or an hour and three-quarters. He always opened the stopcock of the pipe to the hotel between eight and nine in the morning and two and three in the afternoon each day. Sometimes there was not enough water to reach the inlet of the pipe that served the hotel. He had not seen gardens at the porters' houses yet. The public tap at the station was used by anybody and everybody.

Cross-examined: He had had long experience as a pumper, but that was the only station where the people had a public tap. He had seen people go with buckets to water their cattle from the public tap. He had known a case of an engine taking 1,000 gallons of water from his tank.

By the Court: He had known the well yield 12,000 gallons of water in a day—in May of last year.

Frederick Kellow said he was pumper at Prince Albert-road until twelve months ago, and he had been there four and a half years. There was always plenty of water at the well then. He had a vegetable garden at the pump when he was there.

Cross-examined: There were no bluegum trees growing there. If he kept the pump going at Prince Albert-road he could get more water than by pumping the well dry and letting it rest. He had not told Fowler or Finke that there was lots of water at Prince Albert-road if it was only pumped properly.

By the Court: He had never been accustomed to stop pumping because of shortness of water, but only when the tank was full.

Mr. Innes for the plaintiff said that plaintiff relied on the agreement. But consider the position outside the agreement. The plaintiff is entitled to his water on the land—could Government expropriate it? Even that is a question. Yet there was no expropriation. There was an offer to Government of liberal terms - a mere tentative offer by Le Roex never accepted by Government.

The Chief Justice: The question is thereby raised what ought to be done by Government when they expropriate. They don't register or survey—is not the mere use a sign of ownership?

Mr. Innes: Some definite rule ought to be adopted. There ought at least to be registration. But in any case the point ought to have been definitely raised on the pleadings, which it is not, and besides, the water is not capable of expropriation under the Act.

The mere use of the well is not ownership. The guarantee given by them shows they never claimed ownership in the well. How far does the expropriation go? Only to the land required for the line, station, &c.—not to accessories for working a railway—*e.g.* water for engine, coal, wood &c.: only for maintenance and repair of the line itself. Such expropriation is only allowable in terms of Act 19 of 1874, and the Court has always been zealous to restrict Government right to expropriate. *Stubber* v. *Bell* (4 Searle, page 3) shows what the attitude of the Court has been in the past as to expropriation. In that case stone was allowed to be taken for the line only, not for the buildings even, because Act 2 of 1857, only mentioned the line not the buildings.

The water then at the date of the contract was vested in the owner. The agreement does not give the water to Government, it only gives

as much as they require provided Government will pump up to the hotel as much water as is required.

The pleadings do not claim the whole of the water: paragraph 7 shows (as does the prayer in the claim in reconvention) that the Government contends that the water is sufficient for plaintiff.

Even if they set up the case on the pleadings the evidence does not go to show that the water was insufficient for both parties, but they do not set it up, and the only point is whether the hotel is supplied with a reasonable quantity. The defendant's own witnesses show that lately only two hours' water a day were to be allowed at fixed hours—which resulted when no water was in the tank in the hotel getting no water. This has undoubtedly resulted in damage to the hotel—how much we cannot lay down in £ s. d. The hotel is at least entitled to £1,000 or £1,200 damages.

Mr. Joubert for the defence contended that whatever right plaintiffs may have they have not the rights claimed in the declaration. Sir John Cradock's proclamation contains provisions for making and repairing roads. This is taken over in section 1, Act 19, 1874, and *D. C. Stellenbosch* v. *Myburgh* (5 J., 8) interprets the meaning of this. *Slabber* v. *Bell* was decided solely on the grounds that it was the case of a Railway Company and therefore its claims required interpretation *strictissimi juris*. If it had been Government more liberal interpretation would have had to be made as being for the public good. This farm of course is a quitrent farm.

The construction put on the document by the defendant is a far more reasonable one than that of the plaintiff. Of course the Court could only grant a declaration of rights "subject to the agreement," and the whole case depends on a construction of the agreement. As to the case generally, see *McDonald* v. *Colonial Government* (7 J., 290).

Postea (May 20th)

The Chief Justice said: It is difficult to ascertain from the pleadings what the real defence is, but I gather from Mr. Joubert's argument that the Government claims the right to the use of the water obtained from the well sunk in the plaintiff's land as being one of the materials which the Government may use for making and repairing public roads. The water is used by the Railway Department to generate the steam required for the supply of the motive power to the engines, and the engines are used to draw the rolling-stock on the railway line. It would be an entire misuse of the language of Sir John Cradock's proclamation to hold that water applied to such an indirect use is a material for making and repairing the railroad. Fuel is as indispensable as water for the generation of steam, and therefore if water could be lawfully claimed the Railway Department would be entitled to claim the right of taking coal or even firewood from quitrent land without compensation to the owners. The only other ground upon which the Government could claim the water would be that the land in which the well has been sunk has been expropriated, but such expropriation has been neither alleged nor proved. The correspondence however would seem to show that the department was under the impression that the letter written by a former owner named Le Roex and giving it the right, before the railway was constructed, to obtain water from any portion of the land was equivalent to a grant of a servitude. That permission, however, was never registered against the title, and neither the plaintiff nor his immediate predecessor in title was aware of the permission. The Government therefore, had no grant of the water available as against the plaintiff. The question still remains what is the true construction of the contract. Reading the contract as a whole I am satisfied that the parties intended that the owner of the land should have a reasonable share of the water for the hotel before the railway necessities should be supplied. According to Branckmann, the present lessee of the hotel, 1,000 gallons are required a day, and this, although a liberal allowance, does not appear to me to be excessive. The Court will declare that the water in the well is the plaintiffs' property subject to the terms of the contract so long as it is in force, and will interdict the defendant from interfering with the free flow of the water in the pipe leading to the hotel in such a way as to deprive the hotel of its reasonable requirements. The costs must be paid by the defendant.

Mr. Justice Buchanan said: I fully concur. I think it is clear that the proclamation of Sir John Cradock does not confer upon the Government the right to take water for working the railway, and so long as the agreement lasts a reasonable quantity of water should flow to the hotel, and I think about 1,000 gallons is a reasonable daily supply.

Mr. Justice Maasdorp also concurred.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

MAXWELL AND EARP V. J. S. P. LLOYDS. { 1896. May 21st.

Mr. Castens applied for final adjudication of the defendant's estate.

Granted.

HITZEROTH'S EXECUTORS V. J. C. F. PEDERSEN.

Mr. Close applied for judgment under rule 329 (*d*), on a summons claiming £30, rent due with costs.

Granted.

ADMISSION.

Mr. Buchanan applied for the admission of Mr. J. J. Wiggins as an attorney. The oaths to be taken before the Resident Magistrate of Queen's Town.

Granted.

GENERAL MOTIONS.

ESTATE OF J. S. P. LLOYDS.

On the motion of Mr. Castens, Mr. G. W. Steytler was appointed provisional trustee in the insolvent estate of J. S. P. Lloyds.

LIPPERT V. PARKIN. { 1896. May 21st. June 3rd.

Lessor—Lessee—Sub-lessee—Tacit relocation—Rent—Insolvency—Improvements.

The lessee of certain premises, being bound by his lease to make certain improvements during his seven years' term, made such improvements and thus considerably enhanced the value of the land. In the meantime the lessors gave the right of obtaining a lease of the premises at the expiration of the seven years to K., *who did not, however, obtain such lease but ceded his right to the original lessee. After the expiration of the seven years such lessee continued to occupy the premises without obtaining a renewed lease from the lessors, who were aware, however, of his continued occupation. He paid the rent to* K., *without the knowledge of the lessors, for eight years. After the expiration of such eight years the lessors for some time received rent, on the original basis, from the lessee but afterwards claimed increased rent for the preceding eight years by reason of the enhanced value of the land.*

Held (1) that *payment to* K. *without the knowledge or consent of the lessors did not absolve the lessee from liability for rent for the eight years, but* (2) *that such rent should not exceed the sum stipulated for by the original contract of lease.*

The sub-lessee of certain other premises, having made certain improvements thereon, and having thereafter been ejected by the original lessors on the ground of the lessee's insolvency, obtained judgment against such lessors in an action for the value of such improvements.

Held that *such lessors were entitled, in reconvention, to recover the full value of such sub-lessee's use and occupation subsequent to the lessee's insolvency upon the basis of the enhanced value of the land.*

**Parkin* v. *Lippert* (5 Sheil, 211) approved.

This was an action instituted by Edward Lippert, now residing at Johannesburg, in the South African Republic, against Cradock and George Parkin (sons of the late John Parkin, sen.) and against others, the children of the late Wm. Parkin and John Parkin, jun., who were also the sons of the late John Parkin, sen.

The plaintiff set forth in his declaration that:

2. On April 27, 1852, the said John Parkin, sen., then residing at Baakens River Farm, in the district of Port Elizabeth, executed his last will and testament, in terms whereof he bequeathed to his said sons William, John, George, and Cradock Parkin, certain lands with buildings thereon, situate in the town of Port Elizabeth, in trust, that they should jointly stand possessed of the same, and during the term of their respective natural lives should be entitled to receive and enjoy equally for their own benefit the annual rents and profits arising therefrom, and immediately upon the decease of one or more of the sons, the testator declared that the descendants or lawful issue of such son or sons should come into the place of their deceased parent, and that

* 12 S.C.R. 179.

the share of rent or profit accruing to each such son so dying should thereupon go and be divided equally among the lawful issue of such son until the ultimate demise of all the said sons, when the said property should devolve absolutely to the respective issue of the said sons who might be then living, and become their joint property in equal shares and proportions, and be transferred to them jointly in free and unencumbered ownership.

3. The said testator died on October 13, 1856, leaving the said will of full force and effect, and leaving the said sons him surviving.

4. In terms of the said will the said sons became entitled to the use, benefit, and possession of the said property, and the defendants are entitled to the same.

5. On 17th February, 1872, the said four sons let to one James Somers Kirkwood, of Port Elizabeth, a certain portion of the said property, and it was agreed in terms of the said lease, which was in writing, that the said lease should endure for the natural lives of all the lessors at a rental of £31 2s. per quarter, and upon other terms and conditions not now necessary to refer to.

6. Thereafter on March 2, 1872, a written agreement was entered into between the said Kirkwood and Messrs. L. Lippert & Co., in terms whereof the said Kirkwood disposed of his rights under the said lease to the said L. Lippert & Co., upon certain terms and conditions not now necessary to refer to.

7. The said firm of L. Lippert & Co. entered into possession of the said property in 1872, and thereafter the said firm was dissolved and the assets assigned to the plaintiff.

8. The said firm of L. Lippert & Co., and thereafter the plaintiff, continued in possession of the said property under the above agreement, but thereafter, on or about June 24, 1895, by judgment of this Honourable Court at the suit of the defendants, the plaintiff was ordered to quit the premises, the agreement of the 17th February, 1872, having terminated by the insolvency of the said Kirkwood. The plaintiff craves leave to refer to the records of the said suit in so far as necessary.

9. The said firm of L. Lippert & Co., whilst in possession of the said property, and prior to the said Kirkwood's insolvency, erected thereon buildings, which have enhanced the value of the said property to the extent of £1,350.

10. The said buildings were erected *bona fide* and under the belief that the agreement of lease would endure for the period stipulated therein, to wit, the natural lives of all the lessors.

11. The trustee in the insolvent estate of the said Kirkwood lays no claim to compensation in respect of the said buildings.

The plaintiff claimed: (*a*) The sum of £1,350, he tendering to indemnify the defendants against any claim that may be made by the trustee of Kirkwood's estate in respect of the value of the said buildings; (*b*) alternative relief and costs of suit.

For a plea to the plaintiff's declaration the defendants said as follows:

1. They admit the allegations in paragraphs 1, 2, 3, 4, 5, and 8.

2. They admit that the agreement referred to in the 6th paragraph was entered into, but they say that the said agreement was a sub-lease from Kirkwood to Lippert & Co. of the said property, of which he was then the lessee. The defendants were no parties to such sub-lease, and no privity existed between them and Lippert & Co. in regard to the said property.

3. As to paragraph 7 they admit that the firm of Lippert & Co. entered into possession of the property herein referred to in 1872, and that the said firm was thereafter dissolved, but they deny the other allegations in the said paragraph.

4. They admit the erection of the buildings in the 9th paragraph referred to, but they deny the other allegations in the said paragraph, and they also deny the allegations in the 10th and 11th paragraphs.

Wherefore they pray that the plaintiff's claim be dismissed with costs.

For a further plea, in case this Honourable Court should hold that the plaintiff is entitled to compensation, but not otherwise, the defendants said:

5. They refer this Honourable Court to the allegations in their first plea.

6. Even if the plaintiff is entitled to compensation in respect of the erection of the buildings referred to in paragraph 9 of the declaration, which they do not admit, then such compensation should be reckoned merely upon the basis of the present value of a lease of such buildings for the period of the lives of all the lessors. The sum of £63 is the full amount of compensation so calculated.

7. The plaintiff had and enjoyed the use and occupation of certain land and buildings, being part of the land referred to in paragraph 2 of the declaration, and being the portion called Block B in the records referred to in paragraph 8 of the declaration, for the period from 1st January, 1879, to 30th September, 1887, and of certain land and buildings, called Blocks B, C, and D in the same records, for the period from 31st March, 1892, to 30th June, 1895.

8. Under the will of the late John Parkin, sen., the defendants are the proper persons to receive any rent or compensation due in respect of the occupation of the said land and buildings, but there was no specific lease or agreement between the plaintiff and defendants or their representatives as to the rent to be paid for the said land.

9. None of the defendants or their representatives have received any rent whatsoever in respect of the aforesaid Block B for the period first mentioned in paragraph 7; and the first-named five defendants or their representatives have received no rent in respect to their interest in the aforesaid Blocks B, C and D for the period second mentioned in the said paragraph; and the last-named five defendants or their representatives in respect of the said Blocks B, C and D from 1st April, 1895, to 30th June, 1895.

10. The sum of £787 10s. is a fair and reasonable amount to be paid by plaintiff to defendants for the use and occupation of the said Block B, from 1st January, 1879, to 30th September, 1887.

11. The sum of £406 5s. is a fair and reasonable amount to be paid by plaintiff to the first-named five defendants in respect of their interest in the said Blocks B, C and D from 31st March, 1892, to 30th June, 1895.

12. There is due to the last-named five defendants the sum of £12 7s. 6d. as and for rent of their interest in the said Blocks B, C and D, from 1st April, 1895, to 30th June, 1895.

13. The sums of £787 10s., £406 5s., and £12 7s. 6d. are together greater than any compensation which may be due to plaintiff as herebefore in paragraph 6 referred to; and the shares in the said sums to which each defendant is entitled in his own or his representative capacity are together greater than any share in such compensation for which each such defendant may be liable in the same capacity, and the defendants claim each to set off his or her shares in the said sums against his or her liability for the said compensation respectively.

Wherefore they pray that plaintiff's claim may be dismissed with costs.

For a claim in reconvention the defendants (now plaintiffs) say:

14. They refer this Honourable Court to the allegations contained in the second plea in convention.

15. All things have happened, all conditions been fulfilled, and all times elapsed to entitle the defendants (now plaintiffs) in general to be paid the aforesaid sum of £787 10s.; and to entitle the first-named five defendants (now plaintiffs) to be paid the aforesaid sum of £406 5s.; and to entitle the second-named five defendants (now plaintiffs) to be paid the aforesaid sum of £12 7s. 6d.

Wherefore the first-named five defendants (now plaintiffs) claimed: (*a*) payment of the aforesaid sum of £406 5s.

The second-named five defendants (now plaintiffs) claimed: (*b*) payment of the aforesaid sum of £12 7s. 6d.

The defendants (now plaintiffs) in general claimed: (*c*) payment of the aforesaid sum of £787 10s.; (*d*) alternative relief; (*e*) costs of suit.

The replication to the first plea was general. And for a replication to the further plea of defendants the plaintiff said:

1. He admits the allegations in paragraph 7, but denies those in paragraphs 6, 8, 9, 10, 11, 12, and 13. As to those in paragraph 5. he refers to the replication to the first plea.

2. During the period from January 1, 1879, to September, 1886, the said firm of Lippert & Co. paid to the said Kirkwood the sum of £121 10s. in respect of their occupation of the said Block B. And during the period from 10th October, 1886, to September 30, 1887, the said Kirkwood having become insolvent, the said firm paid to the said Kirkwood's trustee the sum of £18 in respect of their occupation of the said block. The said sums were the reasonable and proper sums to be paid in respect of the said occupation.

3. The said payments were made and received with the full knowledge and assent of the defendants, or their agent and representative George Parkin, and were made *bona fide* by the said firm of Lippert & Co. under the full belief that the said Kirkwood, and thereafter his trustee, was the proper party to whom the said payments were to be made. The plaintiff does not admit that the defendants did not receive the said sums, but should the facts alleged in the first portion of paragraph 9 of the plea be proved, the plaintiff says that the defendants by their conduct in lying by with full knowledge of the facts set forth in this paragraph and assenting to the said firm of Lippert & Co. paying, and the said Kirkwood, and thereafter his trustee, receiving the said sums in the manner above described have waived and lost all claim to receive any sum in respect of the above periods from the plaintiff.

4. He admits that no payments have been made by the said firm of Lippert & Co. or by him to the first five named defendants or their representatives from March 31, 1892, to June 30, 1895, or to the last five named defendants or their representatives from April 1 to June 30, 1895; as alleged in paragraph 9 of the plea, he

says he tendered payment to the defendants, who refused to accept the same before the commencement of this suit; he is willing and tenders to deduct from the sum of £1,850 claimed by him in this suit the amounts of £160 17s. 6d. and £12 7s. 6d., which are the reasonable and proper amounts to be be paid to the said defendants in respect of the said periods respectively.

Wherefore, subject to the above, he again prays for judgment with costs of suit.

And for a plea to the claim in reconvention, the plaintiff (now defendant) in reconvention says that he craves leave to refer to the matters above pleaded and to those set forth in the declaration, and by reason thereof he prays that the said claim be dismissed with costs.

The rejoinder by defendants to plaintiff's replication in convention was general save that defendants admitted that plaintiff tendered the sums of £160 17s. 6d., and £12 7s. 6d. to the parties and for the periods referred to in paragraph 4 of the said replication. The replication in reconvention was also general.

A consent paper was put in between the parties "that the allegation in paragraph 11 of the plaintiff's declaration is correct and is hereby admitted in so far that the said trustee has up to the present made no such claim;" that the present value of the buildings erected upon the lands called Blocks B and C in the records referred to in paragraph 8 of plaintiff's declaration is the sum of £3,500 the value of the buildings on Block B being £2,150 and the value of the buildings on Block C being £1,350.

Mr. Searle, Q.C. (with whom was Mr. Sheil), appeared for the plaintiffs.

Mr. Innes, Q.C. (with whom was Mr. Benjamin), appeared for the defendants.

Mr. Thomas W. Chaplin, confidential manager of Mr. Edward Lippert, the plaintiff, said he had been in the plaintiff's employ since 1872. From 1872 to 1888 he was principally in Port Elizabeth. In 1889 Lippert's business was stopped in Port Elizabeth. In 1878 he was bookkeeper to the firm. He knew of the leases between Parkin and Lippert and Kirkwood and Lippert, and he made entries in the books with regard to the payment of rent. The books were destroyed in 1889. The rents in question were paid to Kirkwood from 1878 to 1886, and from 1886 for about a year to the trustee in Kirkwood's insolvent estate. A letter was sent in October, 1887, by the trustee, saying that the rents must thereafter be paid to the Parkins. George Parkin thenceforward received the rents. Plaintiff had the lease of Main-street properties also from Parkins, and George Parkin had received the rent for that property since 1874 to the present day. In 1887, when plaintiff ceased to pay to the trustee, he explained to George Parkin that he had now to receive the rent formerly paid to Kirkwood. In 1892 the question of the validity of the leases came up, and Mr. Smith, secretary of the Ægis Company at Port Elizabeth, was attending to Lippert's business there then. He was quite certain that George Parkin knew that they were paying the rent to Kirkwood or his trustee from 1879 to 1887. In 1891 there was a claim from Parkin that they were not entitled to possession. He had first heard of the claim for back rent on Block B when the pleadings in the present case were filed. Kirkwood had several properties from the Parkins beside the one he had sublet to Lippert. The assets of Lippert & Co. were assigned to E. Lippert, the plaintiff, in 1884. The buildings in question were erected in 1872 or 1873 by Lippert & Co., and it was then thought that the lease would last for the lives of the parties. The value of improvements on Block B was £2,150, and by judgment of the Court plaintiff had lost that.

Cross-examined by Mr. Innes, Q.C.: The rate of rent for Block B was £18 per year, but there was no actual lease of it. The right to take the lease had not been exercised. The rate was 1s. per month per foot of frontage—a fact he gathered from personal knowledge. If no lease had been running, a fair rent between 1879 and 1887 of the Rodney-street properties they held from Parkins would have been about £250 per year. He had no knowledge that Kirkwood handed to the Parkins the rent that the plaintff had paid to Kirkwood. He would have thought it remarkable if Kirkwood had never paid rent of Block B to the Parkins. They were bound to build a store of the value of £1,200 on Block B, and they had built a store there of the value of £3,500. The rates of the rents of the holdings of the various blocks averaged about £30 or £40 per year per block. He should think 2 per cent on the value of the store would have to be set aside for repairs.

Re-examined: Since the expiration of the seven years lease plaintiff had been called upon to repair the building which stood partly on "B" and "C." The rent of the store was £250 per year, and plaintiff had to keep the store in repair and pay fire insurance. The lives of the Parkins were insured by plaintiff to the value of the whole of the value of the properties he held from them, and the yearly premium paid was £300 per year.

For the defence were called:

Mr. George Parkin, living a little out of Port Elizabeth, who said he was seventy-four years old,

He used to collect rents on behalf of his brothers from plaintiff for the properties he held. For Block B he received rent from Lippert & Co. for seven years, between 1879 and 1887. He received no rent after 1887 for the Block B from anybody. His nephew discovered about five years ago that they had got no rent for Block B.

Cross-examined: He thought he was regular about getting the rent—every quarter on the 1st. He knew that Lippert & Co. still continued in possession of Block B after the seven years' lease, but he never got more money from Lipperts after Kirkwood's insolvency. He had not joined in the last action. He never refused to take the rent. He knew four years ago he was not getting the rent. Steps were taken to get the money—it was working now. He never bothered about the law, and he had told them they could work the law amongst themselves.

Mr. Edward Parkin, son of Cradock Parkin, who was seventy-three years old said: In 1891 he had looked through the leases and counterfoils of receipts which his uncle George had, and found no payments for Block B. The counterfoils showed after the last quarter of 1887, when the separate tenants paid rent to the Parkins after Kirkwood's insolvency, an increase of £4 10s. per quarter. He valued the rental of the store on B and C at £150 per year, and the claim for use and occupation between 1879 and 1894 was based on that estimate. The other claims were from careful computations.

Cross-examined: In the previous case nothing was said in the correspondence about back rent for Block B. The Parkins had let eleven separate properties to different parties in Port Elisabeth.

Re-examined: He had mentioned that back rent.

Charles Thomas Mouett said the present tables of life assurance gave the probable continuance of a life of seventy-two years as between 7·575 years and 8·88 years.

Mr. Searle argued that the Parkins could not have refused to give Lippert the lease of Block B if Lippert had formally executed the lease. There was no slur on Lippert's *bona-fides*. The law is clear that the only rent the Lipperts were bound to pay was the same rent as they had been paying up to the end of 1878. At the end of 1878 the position was that if the Parkins wanted to charge Lippert with any higher rent they must give Lippert notice (*Van Leeuwen* 4, 21, 6, p. 172, Vol. 2 Kotzé's translation). Tacit relocation implies that the rent continues the same. English law agrees with ours on this point: *Woodfall on Landlord and Tenant* (pages 583, 585); *Mayor of Thetford* v. *Tyler* (8 Q.B., 95); *Slack* v. *Sharp* (8 A. and E., 366). Lippert therefore remained at the same rental. The defendants have allowed a long time to elapse and now claim the stale rental. They had just as good a claim in the previous case as they have now. It is inconceivable that George Parkin did not know of it. They have lost all claim for the rent we paid Kirkwood. As to the rent we never paid at all; we tender in the pleadings £160 17s. 6d. They want £245 7s. 6d. It was their duty if they wished us not to remain any longer to have warned us the rent would be raised. For a long time they were hopelessly at sea in fact as to what *were* their rights. Not till 1894 did they give us the notice.

Postea (3rd June).

Mr. Innes for defendants contended that the first point to consider is: Is there compensation payable? Section 104, Insolvent Ordinance, steps in to terminate the lease as between Kirkwood and Lippert, and Lippert can claim from Kirkwood's trustee. Can Lippert also claim from Parkin? There is no privity between Lippert & Parkin. Can we possibly put a lessee in position of a *bona-fide* possessor seeing that he holds *pro domino*? A lessee differs greatly from such possessor as to the amount of compensation for improvements: the *bona-fide* possessor being far more generously treated.

The Chief Justice: Yes, but is not the lessee, when section 104 applies and compulsorily terminates the lease, in the same position as to compensation as the *bona-fide* possessor.

Mr. Innes: Though this is an urban tenement and sub-lessee is entitled to be there this creates no privity as between sub-lessee and lessor.

The Chief Justice: The whole of the doctrine of ameliorations is based on the assumption that the lease is allowed to run. If it is put an end to by law or by the lessor the sub-lessee is in the position of a lessee as to claim for ameliorations.

Mr. Innes: Not where law terminates it. If the lessor wrongfully terminates, the sub-lessee can claim, but not if the law terminates.

The Chief Justice: The principle of the common law is that one man shall not be enriched at the expense of another. Section 104 simply confirms this principle.

Mr. Innes: True, but Lippert is not suing under the Insolvent Ordinance. See *Lyons and Stone's Trustee* v. *L. & S.A. Exploration Co.* (6 H.C., 217), as to ameliorations. See the hardship if the value of the ameliorations is to be fixed independently of the time limited. The peculiar facts here are that the lease is for an uncertain time and that

at the expiration of the lease the improvements will go to the lessor: so that if section 104 is applied the lessee may be in far better position than if the lease had run. Further if compensation is held by the Court to be payable the next point is—have we no counter-claim? There is clear evidence that for eight and three-quarter years Parkin has received no rents for Block B. We submit £90 a year is a fair value. Roman-Dutch law is severe on the tenant who holds on after expiry of lease where there is no express agreement or tacit relocation. *Voet* (19 2, 32) shows that he has to give up the landed property, pay full value and damages. This is founded on a Placaat which, however, *Groenewegen* (Ad. Cod. 4, 65, 34) says is obsolute. But it shows the severity of Dutch law, which here resembles English law: *Woodfall on Landlord and Tenant* (Chap. 20, section 2*b*). We are therefore entitled to considerably more ground rent than is tendered.

Mr. Searle replied on the counter claim. There was a tacit relocation of Block B, and the only claim they could make would be £157 10s. The only thing is for the Court to ascertain whether the Lipperts did not pay the rent to Parkin or Kirkwood. There would then be complete waiver by Parkin of his right. He was evidently fully conscious of what his rights were. As to tacit relocation, see *Parkin* v. *Lippert* (5 Sheil, 219).

The Chief Justice said: The basis upon which compensation ought to be awarded to the plaintiff was virtually settled in the action brought last year by some of the present defendants against the plaintiff* (5 Sheil, 219). Although the present plaintiff was ordered to vacate the premises and declared not to be entitled to retain possession until payment of compensation, the Court expressed a decided opinion that he could sue for compensation to the extent of the enhanced value of the land. The defendants, having taken advantage of a statutory provision by which the lease was practically forfeited, were held not entitled to claim a further forfeiture by the sub-tenant of all improvements made by him in contemplation of the lease running for its full period. The right reserved to the trustees of insolvent lessees by the 104th section of the Insolvent Ordinance to sue for the amount of ameliorations made by such lessees is a common-law right. It is a right, however, which only arises where the lease has been prematurely determined by operation of law. The same right belongs to the sub-lessee who has made improvements. If he is ejected before the expiration of the original lease and of the sub-lease he has the common law-right of a *bona-fide possessor* to sue the person ejecting him for the value of his improvements, although, like the trustee of the insolvent lessee, he no longer has the common law-right of retention enjoyed by *bona-fide* possessors. The value of the improvements on Lot C is admitted to be £1,350, and for this amount the plaintiff is entitled to judgment. Coming next to the claim in reconvention the defendants claim rent for Lot B for eight and three-quarter years at the rate of £90 a year. The rate at wnich the plaintiff had hired the land under his seven years lease was far less, but the improvements made by him on that portion would have fully justified the increased rent. The defendants, however, allowed the plaintiff to continue in occupation without demanding any increased rent. He clearly was under the impression that he was entitled to occupy the premises at the original rent, and he in fact paid such rent to Kirkwood during the eight and three-quarter years. Kirkwood never entered into a contract of lease of lot B with the defendants, and there is no evidence to show that they consented to or were even aware of the payments being made to him. They are therefore now entitled to recover rent from the plaintiff but only at the rate agreed upon in their original contract of lease for seven years. That term had expired but by their conduct afterwards they tacitly relocated lot B to the plaintiff for the period, at all events, during which he retained occupation. Their claim for increased rent is further weakened by the fact that for some time after the expiration of the further period of eight and three-quarter years they actually accepted rent from the plaintiff, at the rate originally agreed upon. For these eight and three-quarter years the rent would amount to £157 10s., and for this sum the defendants are entitled to judgment. As to lots C and D, they are on a different footing. The plaintiff hired them from Kirkwood, who had hired them from the defendants. For the improvements made on lot C ample compensation has been awarded to the plaintiff, and he must now pay for his use and occupation after Kirkwood's insolvency. In computing the amount to be paid the enhanced value of the land in consequence of the improvements must be taken into consideration. He himself let the land for £250 a year, being for more than the rent payable by him to Kirkwood and this sum fairly represents the value to him of his use and occupation. He has already settled with some of the defendants, and the balance claim-

* Reported xii. S.C.R., p. 179.

able by the remaining defendants amounts to £406 5s. The plaintiff admits a further sum of £12 7s. to be due to the defendants. Deducting then from the amount awarded to the plaintiff the sums payable to the defendants there remains a balance of £773 17s. 6d. in his favour, for which judgment must be given with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

METZLER V. METZLER. { 1896. May 22nd.

This was an action for restitution of conjugal rights, brought by the plaintiff against her husband.

Mr. Joubert appeared for the plaintiff.

Mrs. Johanna Helena Metzlar said that she was married to the defendant at Stellenbosch in 1883. There were two children, the eldest, a boy of eleven, being alive and staying with her sister at Kimberley. She had not seen her husband for five years. She was then living at Kimberley. She had written to him at Campbell to allow her to come to him, but he said she would have to wait, and had not written to her for three years. They were married in community of property, and she claimed custody of the child.

By the Court: She had kept herself by keeping a boarding-house. She had written last to the plaintiff, and had received no answer.

Mr. Norman Lacy produced the marriage register.

The Chief Justice said: You may take a decree for the restitution of conjugal rights, calling upon the defendant to return to or receive the plaintiff on or before the 20th of June; failing which you may take a rule calling on the plaintiff on July 13 to show cause why a decree of divorce should not be granted with costs, and plaintiff declared entitled to the custody of the child.

[Plaintiff's Attorney, C. W. Herold.]

GLASS V. GRAHAM'S TOWN BRICKMAKING CO.

Removal of trial—Balance of convenience.

Application by the defendants for the removal of the suit between the parties for trial before the Court of the Eastern Districts, on the ground that all of the witnesses for both sides live in the immediate vicinity, and that the subject matter in dispute is within a mile of the outskirts of Graham's Town.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Schreiner, Q.C., appeared for the respondent.

The Chief Justice said: There is no doubt that as a general principle the plaintiff is entitled to select his forum. But it still remains for the Court to say whether that forum is to be the forum in which the case shall be tried. If the balance of convenience is in favour of the case being tried elsewhere, the Court may exercise the power given by the Sovereign to remove the hearing. This is essentially a case which ought to be tried in the other Court. There are a great many witnesses, and they all reside in Graham's Town or the neighbourhood, and the case itself arises within a distance of a mile, or a little more, of the Court, where there are judges available for the purpose of trying the case. I confess I cannot see sufficient reason to require the case being heard in the Supreme Court. It seems a case which depends mainly on evidence. There seems no important question of law involved, and it will always be competent for the plaintiff still, upon a question of law, or even on a question of fact, if he feels himself aggrieved, to appeal to the Supreme Court, and if there was such an appeal the expense would not be very much greater than having the trial initially at this Court. In my opinion this case should be removed for trial to the Eastern Districts Court. Costs to be costs in the cause.

Their lordships concurred.

TURVEY V. PIENAAR.

Mr. Smuts applied for the attachment of certain two lots of land marked Nos. 149 and 150, situate in the village of Cala, *ad fundandam jurisdictionem* of this Court in an action about to be instituted by applicant against respondent, who has left the Colony, for the recovery of amounts due on mortgage bonds.

Leave granted to attach the lots *ad fundandam jurisdictionem*, and to sue defendant by edictal citation, returnable on July 13, personal service if possible, failing which one publication in the Pretoria "Volksstem."

THE PAARL BANK.

Mr. Schreiner applied for an order in terms of the third report of the official liquidators.

An order was made to file the account, and the Court granted the recommendation in the last clause of the report.

QUEEN V. MATATI.
QUEEN V. BUCHENROEDER. } 1896. May 22nd. „ 28th.

Abduction —Man-stealing—Child-stealing—Criminal Offence—Indictment—*Plagium.*

The wrongful and unlawful taking away from her father's custody of a minor child does not constitute the offence of abduction *unless committed with the view to marriage or from motives of lust.*

Man-stealing *is a punishable offence and consists in the wrongful and unlawful carrying away or concealing of a human being with a view to depriving him of his liberty.*

If the offence is committed on a child it is properly described in the indictment as child-stealing.

There were two cases heard: (*a*) *Regina* v. *Matati*, for argument of the question reserved by the Circuit Court of Vryburg for the consideration of the Supreme Court, as to whether the facts set forth in the indictment constitute the crime of abduction, with which the accused was charged, and for which he was convicted.

(*b*) *Regina* v. *Buchenroeder*, for argument of the question reserved by the Circuit Court of Uitenhage for the consideration of the Supreme Court, as to whether child-stealing, for which the accused was indicted and convicted, is an offence according to Colonial law.

Mr. De Wet appeared for the prisoner in each case at the request of the Court.

Mr. Sheil (Assistant Law Adviser) appeared for the Crown in each case.

Mr. De Wet, arguing on *Matati's case*, said that our *abduction* is equivalent to *raptus*, which must be *libidinis causa* (Brouwer, Bk. II. 23). It was so in English law—*Queen* v. *Tinkler* (1 Fost. and Fin. 513)—till the Act of 1861 constituted three separate offences, and under that Act the mere taking away of girls under sixteen is an abduction. But our authorities require the intention to constitute *raptus*, and if abduction includes more it includes two distinct crimes. *Voet* (46, 2, 3) says there can be no theft of a free man except in case of *filius familias*.

Chief Justice: Yes, but *Voet* says that is because the father has by *Patria potestas* a *quasi dominium* which now he has no longer.

Mr. De Wet: *Plagium* (kidnapping) is distinct from *raptus* (abduction). As to *plagium* see *Carpzovius* (Part II., Quest. 83, section 89). As to *Buchenroeder's case—plagium* is a *suppressio*, *i.e.*, depriving of liberty: *Matthaeus* (48, 12, 1); *Van der Linden* (Juta's Translations p. 228); *Moorman* (4, 3, 4); *Brouwer* (2, 23, 8). Brouwer calls it *Furtum Hominis*, *i.e.*, mere theft of a man. *Voet* denies that there can be such a theft except as to a *filius familias*, *i.e.*, taking a child out of his father's possession, and *potestas*. As latter is not known to us as in Roman law, child-stealing to become an offence with us must be made so by statute. *Plagium* or kidnapping does exist, the question is whether it is child-stealing.

Mr. Sheil as to *Matati's case*, argued that even assuming that abduction and *raptus* are the same —the question is whether the essence is the *causa libidinis* or the taking away. From our cases the removal seems the essence, though the Roman-Dutch authorities seem to lay down the intention as the essence. But as Matthaeus points out a woman may abduct a man. After the removal the law presumes the intention though not irrefutably. As to the custody of the parents, see *R.* v. *Wilderman* (6 Juta, 295). As to *Buchenroeder's case* see *Van Leeuwen* (38, 4, 4); *Justinian's Institutes* (4, 1, 9); *Voet* (47, 2, 3). *Patria potestas* does not as such exist, but the guardianship of children is as jealously guarded as in the old law.

C.A.V.

Postea (May 28th.)

The Chief Justice said: The Court is much indebted to Mr. De Wet for arguing these cases at its request on behalf of the two accused persons.

The facts alleged in the first indictment are that *Matati* did in October, 1895, wrongfully and unlawfully take and abduct one Sohokwi, the minor daughter of Kumoying, out of the possession and against the will of her father, her legal guardian with whom she was then residing, and the question reserved is whether these facts constitute the crime of *abduction*. The evidence given at the trial of this and other cases before me at Vryburg disclosed the fact that slavery still exists as an institution recognised by several native tribes in Bechuanaland. The slaves are known as *Vaalpensen*, and the masters are also natives, who claim the hereditary right to the services of their father's slaves and the children of such slaves. Kumoying had been the slave of the prisoner's father and the prisoner claimed the right of

taking Kumoying's daughter, a child under fourteen, out of her father's custody, and employing her against her will as a nurse to his own children. There was no motive of lust in the matter. The child admitted that she was well treated and well fed, and that she was not made to do any other work than that of a nurse. The father appeared as surprised as the prisoner himself when I informed them that the law does not recognise the custom of slavery in any shape or form, and that future cases of this kind would be severely punished. The prisoner had been in gaol for three months, and I therefore sentenced him to the payment of a fine only, but I reserved the question whether his offence was correctly stated as that of abduction. That he was guilty of a punishable offence I did not then nor do I now doubt. The Dutch law, following the *Lex Fabia de plagiariis* of the Roman law, regarded the carrying away of a human being, with a view to depriving him of his liberty, as a grave offence punishable with the severest penalties. See *Voet* (48, 15). But the term "abduction" was only applied to such carrying away of a minor, without the knowledge or consent of the parent or guardians, as was done for the purpose of marriage or from motives of lust. It was wide enough to include *raptus*, which is defined by *Van der Keessel* (Thes. 71) as the violent abduction of a youth or virgin, but I cannot find that the term was ever used where marriage or lust was not the intent or motive. In this Court there have been indictments which contained two counts, one of these being silent as to the intent, and the other charging the intent, but in every case of conviction there has been proof that the intent was either to marry or to have carnal connection. In my opinion the facts stated in the indictment in question are not sufficient in law to constitute the crime charged, namely, that of *abduction*. Upon the facts stated the charge should have been that of *man-stealing*, which is the nearest equivalent of *plagium*, the term "man" being used in the generic sense of "a human being" and the term "stealing" in a somewhat wider sense than "theft." The question reserved must be decided in the prisoner's favour and the fine will accordingly be remitted.

In the second indictment in question, *Buchenrooder* was charged with "child stealing" in that he did wrongfully and unlawfully steal and carry away, or decoy and entice away Philip Jafta, the minor son of Rose Baatjes, with intent to deprive her of the lawful possession of the said Philip Jafta, who was a child of the age of about twelve years. The question reserved is "whether the crime charged is an offence according to our law." It follows from what I have said that this question must be decided in the affirmative. *Man-stealing—plagium—i.e.*, the stealing of a human being is undoubtedly a punishable offence, and consists in the wrongful and unlawful carrying away or concealing of a human being, with a view to depriving him of his liberty. It is no defect in the indictment that the offence is specifically charged as *child stealing*. As far back as 1861, a prosecution took place in the Supreme Court for this offence, and the prisoner was convicted. The legality of that conviction has never been questioned. The term stealing is not strictly appropriate when applied to a human being, but it is the nearest equivalent for an offence which is admitted by every authority on the Dutch Criminal law to be a punishable offence. The conviction must therefore be affirmed.

BOARD v. TITTERTON. { 1896. May 22nd.

Will—Construction—"Issue"—Children—*Per capita—Per stirpes.*

A testator by will bequeathed certain landed property to his daughter E. *and directed that on her death the property should devolve on her lawful issue, who should then be living, in equal shares and proportions.* E. *survived the testator and then died leaving her surviving five daughters, but the sixth daughter* F. *predeceased her, leaving children.*

Held (1) *That in the absence of clear indication to the contrary in the will, the term "issue" embraces all the descendants of* E.

(2) *That the children of* F. *are entitled to share in the bequest with* E.'s *surviving daughters, and*

(3) *That the children of* F. *should share with the children of* E. per stirpes *and not* per capita, *and are, therefore, only entitled to the share which would have devolved on* F. *in case she had survived* E.

This was a special case for the determination of the Court stated as follows:

1. The plaintiffs are the lawful children of the late Jane Charlotte Board, who was in her lifetime a daughter of the late Elizabeth T. Merton, and was lawfully married in community of goods to Henry Price Board, now deceased,

2. The defendant is the executor testamentary of the late Elizabeth Titterton, a daughter of the late John Parkin, who had a domicile at Port Elizabeth in the Cape Colony.

3. On the 27th of April, 1852, the said late John Parkin made his last will and testament, and thereafter died leaving unrevoked his said will, copy whereof is hereunto annexed.

4 By clause 3 of the said will the testator gave, devised, and bequeathed the landed property therein mentioned to his aforesaid daughter Elizabeth Titterton in trust that she should stand seized and possessed of the same and be entitled to receive and enjoy the annual rents, interest, issues, emoluments, income and profits thereof arising therefrom for her own sole use and benefit during the term of her natural life and at and immediately upon her decease then the testator declared that the whole of the said property should devolve to and become the property free and unencumbered of the lawful issue of his said daughter who should then be living, in equal shares and proportions, and should forthwith be transferred in their joint names, and from thenceforth be and remain for their joint use and benefit and at their sole and absolute disposal.

5. The testator by clause 11 of the said will further declared that in case any of his children should depart this life without leaving lawful issue, then and in such case, the property or share of property bequeathed by his will to such child so dying, should forthwith be sold and disposed of, and the proceeds divided equally amongst all the testator's children, both of the first and second marriages, share and share alike.

6. Elizabeth Titterton survived the testator, and then died leaving her surviving five daughters with their children, numbering in all twenty-eight, but her sixth daughter, the plaintiff's mother, predeceased Elizabeth Titterton, leaving the plaintiffs, her children, her surviving.

7. The landed property referred to in paragraph 4 of this case is of the value of £1,925 or thereabouts.

The plaintiffs contend:

(*a*) That they are "lawful issue" of Elizabeth Titterton within the meaning of the said will, and that they became upon the death of Elizabeth Titterton entitled to shares in the landed property aforesaid in terms of the testator's will.

(*b*) They contend further that they are each entitled to a *pro rata* share with all other children and grandchildren of Elizabeth Titterton living at her death.

The defendant contends:

(*a*) That the plaintiffs are not entitled to share in the landed property aforesaid, but that the said property, upon the death of Elizabeth Titterton, devolved in equal shares upon her five surviving daughters.

(*b*) Alternatively: Should this Honourable Court be of opinion that the plaintiffs are entitled to any share in the said property, then the defendant contends that they are only entitled to take "*per stirpes*" the share which would have devolved upon their mother had she survived the said Elizabeth Titterton.

8. Wherefore the parties pray for judgment upon their respective contentions, or in the alternative that this Honourable Court may declare the rights, if any, of the plaintiffs under the will of the late John Parkin, and they pray that the costs may be ordered to come out of the estate of the late Elizabeth Titterton.

Mr. Innes for the defendants: As to what is presumably the meaning of the words "lawful issue" see *Jarman on Wills* (p. 946).

The Chief Justice: But the will contains the words "descendants or lawful issue" as if synonymous.

Mr. Innes: The broad meaning of issue is of course inclusive of grandchildren, but the language in **Human* v. *Human's Executors* (3 Sheil, 160) shows that the Court will not include grandchildren unless driven to it. Now clauses 1, 6, 7, 8 of the will deal with disposition to groups of children. Others deal with single children, and later clauses use the expression "lawful issue" without joining the word "descendants." Wherever the testator uses the word "issue" it is to be assumed he means the same thing. Now by issue in clause 1 he evidently means children alone as opposed to "parent" in same clause. "Descendants or lawful issue shall represent their deceased father." *Jarman on Wills* (p. 949) shows that in certain clauses "issue" must be restricted to the narrowest sense, *i.e.*, children - because they are to succeed to their *parents*. If the issue is so limited in one clause it must be taken to be the same in all the clauses. Moreover in wills it is very seldom provision is made for descendants beyond grandchildren of testator.

The Chief Justice said: By the 3rd clause of the will which the Court has to construe the testator, John Parkin, bequeathed to his daughter Elizabeth, wife of William Titterton, certain landed property, in trust that she stand seized and possessed of the same, and receive the annual income thereof during her life, and he declared that on her death the property

*10 Juta, 172.

should "devolve to and be and become the property of the lawful issue of his said daughter, who shall then be living, in equal shares and proportions." By the 11th clause the testator declared that in case any of his children should die without leaving lawful issue, then the property or share of property bequeathed to such child so dying should forthwith be sold and disposed of and the proceeds equally divided amongst all the testator's children. Elizabeth Titterton survived the testator and then died, leaving five daughters with their children, numbering in all twenty-eight, but her sixth daughter the mother of the plaintiffs, predeceased Elizabeth Titterton, leaving the plaintiffs, her children, her surviving. The questions to be determined are whether the plaintiffs are entitled to share in the bequest with Elizabeth Titterton's other descendants, and if so entitled whether they are to share *per stirpes* or *per capita*. The answer to the first question depends upon the construction placed on the term "issue" as used in the 3rd clause of the will. If the word "children" had been used the matter would have admitted of some doubt. The fact that we are dealing with the will of an ascendant and not of a collateral relation would have been a circumstance tending to support the view that all descendants were intended to be included: *Pretorius* v. *Executors of Pretorius* (2 Juta, 293). But the use of the word "issue" prevents any doubt on the point. The word *prima facie* embraces all the descendants of the testator's daughter, and should be so construed unless there is the clearest possible indication of a different intention in the will. The Court has been referred to other portions of the will in support of the contention that the bequest should be confined to children only but they do not support this limited construction. On the contrary, they show that the testator used the word "issue" as synonymous with "descendants." I am of opinion, therefore, that although the plaintiffs' mother died before Elizabeth Titterton, the plaintiffs, as the lawful issue of their grandmother, Elizabeth Titterton, living at the time of her death, are entitled to share in the bequest. As to the proportion in which the plaintiffs should share with Elizabeth Titterton's children, if the question had related to intestate succession the grandchildren would certainly have taken *per stirpes* and not *per capita*. In making this distribution the law only follows what it considers the deceased ascendant would have done if he had regulated the succession himself. Now it may fairly be presumed that the testator in the present case intended to please all his wife's children on exactly the same footing and that he did not intend that the share of any one of them should be reduced by reason of the death of any of the others before their mother. The use of the expression "in equal shares and proportion" strengthens the view that he did not intend the children, however large the number, of any predeceasing child of Elizabeth Titterton to share equally with Elizabeth Titterton's surviving children. In my opinion the plaintiffs are only entitled to take the share which would have devolved on the mother if she had survived Elizabeth Titterton. The costs of this action will come out of the estate.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Findlay & Tait; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

GIBSON V. FROST. { 1896. May 22nd. „ 28th.

Lessor and lessee—Improvements—Materials—Compensation—Tacit hypothec.

The tenant of premises on a monthly tenancy placed a fence round the premises with the consent of the landlord and afterwards upon receiving notice to quit she claimed from him, as compensation, the then value of the materials and gave notice that failing payment she would remove the materials before the expiration of her tenancy. The landlord refused to pay compensation and prohibited the removal of the materials.

Held that, *although the landlord had transferred the land before the expiration of the tenancy, the tenant was entitled to recover the value of the materials from him as the person who had let the land to her, with whose consent the improvements had been made, to whose land the materials had been annexed, and who, during the subsistence of the lease, had prohibited the removal of the materials.*

This was an appeal from the Resident Magistrate, Port Elizabeth, brought by the defendant in the Court below.

Mr. Schreiner, Q.C., appeared for the appellant.

Mr. Graham appeared for the respondent.

In the Resident Magistrate's Court the summons claimed the sum of £15, as and for the value of certain improvements made by

the plaintiff to the defendant's house and premises while in the occupation of the plaintiff:

And thereupon the plaintiff complains and says:

1. That in or about the year 1892 the plaintiff became the occupier of the said defendant's house situate in the Broad-street, North End, Port Elizabeth:

2. That during her tenancy the said plaintiff erected a wood and iron fence round the said property and expended sums of money and bestowed much time and labour thereon:

3. That the said occupation expired on the 31st January, 1896, and the said plaintiff on such expiration gave up to the said defendant the benefit of such fence, money, time and labour as expended and bestowed as in the last paragraph mentioned.

4. The plaintiff as outgoing tenant was, on the expiration of such tenancy as aforesaid, entitled to the sum of £15 for such fence as aforesaid.

5. That the defendant has not paid the said sum of £15 or any part thereof although demanded so to do:

The following was the defendant's plea:

The defendant denies the debt and pleads that the property in question has been transferred and is not now the property of the defendant.

At the hearing plaintiff's agent applied to amend the summons by inserting the words "and a shed and other improvements therein" in the second paragraph after the word property and to add the words "shed and other improvements" in paragraph 3 after the word "fence" and in paragraph 4 to add the words "shed and other improvements after the word "fence." Summons ordered to be amended accordingly.

Judgment was for plaintiff as prayed with costs.

The following were the Magistrate's reasons:

In this case the plaintiff is the stepdaughter of the defendant. In 1891 the plaintiff occupied the house in question and the defendant boarded with her. She paid him £2 a month rent and he paid her £4 a month for boarding. She also had other boarders. The house was in a bad state of repair inside and required various additions outside. These the plaintiff caused to be effected, but not until after the defendant had assured her that in a will he had made he had left her the property.

The plaintiff believed the defendant, and relying on what he had told her, she expended a sum of between £15 or £18 on these repairs and improvements.

The defendant saw what was being done but did not in any way interfere. In 1895 for the first time the plaintiff became aware that the property had been transferred to defendant's son, James Gibson, and she at once remonstrated with the defendant, who told her she could live at the house as long as she lived. At her request a document to this effect was drawn up for the signature of James Gibson, but he refused to sign it and the plaintiff on terms of notice left the house at the end of January, 1896. She at once, when she discovered what had been done, claimed a refund of the money she had expended from the defendant.

I am satisfied that had the defendant not informed the plaintiff that he had left her the house she would not have incurred the expense in question, and as the defendant had so grossly misled the plaintiff throughout he is in my opinion bound to refund to her the money spent on the improvements, &c., in question, and as the amount was not in dispute judgment was accordingly for the plaintiff for the amount claimed.

The fact that the property has been transferred to James Gibson does not in my opinion relieve the defendant of his liability in this action.

Mr. Schreiner for the appellant said: The Resident Magistrate appears to have lost sight of the decision in **De Beers* v. *L. and S.A. Exploration Co.* (3 Sheil, 438). Plaintiff chose to bring an action against my client instead of the owner, and she did not even remove the improvements during her tenancy.

The Chief Justice: Was not notice to quit given by your client?

Mr. Schreiner: Yes, but she refused to accept the notice as insufficient. My client it is true has the life interest, but is not the proper person to be sued; the proper person is the one who has the actual ownership.

The Chief Justice: She would have removed if your client had not forbidden her. Does not that found action against him?

Mr. Schreiner: No, it would only have placed him in that position if a landlord, but that he has ceased to be. The question raised is whether the circumstances amount to consent, (this differentiating it from De Beers case), *i.e.*, such consent as would bind the new owner. The action for compensation is an action *in rem* passing as against all new owners.

Mr. Graham for the respondent said that the defendant cannot object to being sued considering the relations between the plaintiff and defendant. He was the person from whom she

* 10 J., 359.

hired; he prevented her from removing the improvements. She would otherwise be remediless.

C.A.V.

Postea (May 28th).

The Chief Justice said: In 1891 the defendant being the owner of certain premises at Port Elizabeth, let the same to the plaintiff—who is his stepdaughter—on a monthly tenancy. During the tenancy she placed a fence round the premises and made other improvements with the consent of the defendant. I say "with his consent" because he was living with the plaintiff, knew and saw what she was doing, never objected to it, and gave her to understand that she was to have the property after his death. In May, 1895, he transferred the property to his son, but he continued to receive the rent from her and otherwise to treat her as his tenant. In December, 1895, his agent wrote to her requesting her to give him possession of the premises on the 31st January, 1896, as he required the same for his own use. She thereupon gave him notice that she would leave the premises on the day specified, but claimed £15 as compensation for the improvements, and added that she would be prepared to remove the fence and other improvements if he refused to pay her the sum demanded. His reply was that the property now belonged to his son against whom the claim should be made, and that, if she should attempt to remove the fence, steps would be taken at once against her. Accordingly she did not remove any of the materials annexed by her to the land but, after the termination of her tenancy, instituted an action in the Magistrate's Court for £15, being, as I understand the summons, the then value of the materials constituting the fence. Judgment was given for the plaintiff on the ground that she had been induced to incur the expense on the defendant's promise that the property would be left to her by will. In my opinion, the judgment should be affirmed, but not on the ground stated by the Magistrate. The evidence as to the defendant's promise tends to prove that, in encouraging the plaintiff to incur the expense of the improvements, he consented to her making them, but in the absence of any allegation in the summons of fraud, the evidence cannot be used in support of the Magistrate's view that the defendant intentionally misled the plaintiff into making the improvements for his benefit. The real ground upon which the judgment must be supported is that, as the plaintiff made the improvements with the defendant's consent and was prohibited by him from removing the materials during her tenancy, she became entitled, on the expiration of her tenancy, to recover the then value of the materials from him. The defendant's counsel admits that by the law of this colony, as explained in *De Beers Mines* v. *L. and S.A. Exploration Co.* (3 Sheil, 438), the plaintiff is entitled to compensation for the value of the materials, but he contends that such compensation should be claimed from the present owner, because by law a tacit or legal hypothecation is reserved to the lessee for such compensation. It is not quite clear whether the transfer to the son was made by virtue of "a true and *bona fide* bargain for valuable consideration," but if it was, then the question would arise whether the effect of the 9th section of Act 5 of 1861 is to relieve the land of the tacit hypothecation. But even if the tacit hypothecation continued to exist it does not follow that the tenant has lost her personal right of action against the landlord with whom she had entered into the original contract of lease, with whose consent the improvements had been made, to whose land the materials had been been annexed before he parted with the ownership, and who, during the subsistence of the tenancy, had prohibited the removal of the materials. That personal right she, in my opinion still enjoys, whatever real rights she might retain in respect of the land itself. It may well be that a landlord would have a good defence if he proved that after he ceased to be owner and before the termination of the tenancy the tenant negligently failed to remove the materials, but that defence is not available to the defendant, who prohibited the removal of the materials. The plaintiff's legal position is further strengthened by the fact that although the defendant has parted with the ownership, he still retains a usufructuary interest in the land. It is not clear from the evidence whether the defendant retains an interest for his life and if this question were a material one the Court would have remitted the case for further evidence. But it is abundantly clear that at the time when the tenancy expired the defendant still regarded himself and was regarded by the plaintiff as the landlord of the premises. It was he who gave notice to quit, received the rent, and prohibited the removal of the materials before the expiration of the plaintiff's tenancy. The estimate of £15 as the value of the materials left behind appears to be somewhat high, but as that has not been urged as a ground of appeal the Court is not called upon to reduce the amount. The appeal must be dismissed with costs.

[Appellant's Attorney, G. M. Walker; Respondent's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

ATMORE V. CHADDOCK. | 1896. May 27th. June 9th.

Executors—Administrators—Trust funds—Improper investment Will - Partnership.

Where executors or administrators have dealt improperly with the trust funds which it was their duty to invest in a particular manner, the beneficiaries can elect whether they shall claim the sum which would have been due if the investments had been properly made or whether they shall claim the full sums realised by means of the unauthorised dealings.

An administrator who has improperly paid trust funds to his co-administrator is entitled to an order compelling such co-administrator to join with him in investing the money in the manner directed by the will, but, on the other hand, he is liable to an action at the suit of the beneficiary to compel him to make such investment, even although the co-administrator may be entitled to a life interest in the funds.

This was an action by John Joseph Atmore personally and in his capacity as executor testamentary jointly with the defendant of the estate of the late Edward Atmore against Rebecca Chaddock (assisted so far as needs be by her husband) personally and in her capacity as executrix testamentary with plaintiff of the said estate as defendant, and Clarkson Tredgold in his capacity as *curator ad litem* to the minor child of the said late Edward Atmore and Rebecca Chaddock (lately Atmore) as intervening defendant duly appointed by the court, with powers as such.

The plaintiff's declaration set forth:

1. The plaintiff resides at Woodstock in this colony, and the defendant heretofore also resided there, but now resides at London in England, and has duly been summoned to appear to answer this suit before this Honourable Court.

2. For a period before the 29th day of September, 1888, and until the execution of the deed hereinafter referred to on that day, the plaintiff and the defendant (then a widow) carried on business in partnership at Woodstock aforesaid as millers and bakers, and on that day a deed of dissolution of partnership was entered into, for the terms whereof the plaintiff craves leave to refer this Honourable Court to a copy thereof, hereunto annexed and marked A, which the plaintiff prays may be read as though here inserted.

3. In accordance with the said deed the plaintiff has duly paid to the defendant the sums of £250 and £830 therein in clause 5 referred to, and has released the defendant from all liability from the partnership debts.

4. All conditions have been performed, all things been done and all times elapsed necessary to entitle the plaintiff in terms of clauses 3 and 6 of the said deed to claim and demand that the defendant shall cause to be transferred to him all her right, title, interest and share in and to the landed property on that day forming assets of the said partnership, and the execution and delivery of the necessary power or powers of attorney for that purpose, but after lawful demand the defendant neglects and refuses to cause such transfer to be made or to execute and deliver the necessary power and powers of attorney for that purpose.

5. The plaintiff and defendant are jointly executor and execut ix testamentary of the late Edward Atmore, brother of the plaintiff and husband of the defendant.

6. The sum of £830 hereinbefore referred to which has been paid to the defendant should in terms of the last will and testament of the said Edward Atmore be invested in public stocks, funds, or securities of the United Kingdom or India, or any Colony of the United Kingdom or any foreign country or State, or upon any real or leasehold securities in England or Wales, or in the stocks, funds, shares, debentures, mortgages or securities of any corporation, company, or public body municipal or otherwise in the United Kingdom, or any foreign country or State, or upon any real securities in any foreign country.

7. The defendant is by the said will and testament entitled to the usufruct or life interest in the said sum of £830, but it is her duty acting jointly with the plaintiff in their aforesaid capacities to cause the said sum to be invested in accordance with the said will, but after lawful demand she neglects and refuses so to invest or cause to be invested the said sum.

8. The capital of the said sum after the death of the defendant devolves under the said will upon the only child of the said Edward Atmore, still a minor.

Whereof the plaintiff in his personal capacity prays for:

(*a*) An order compelling the defendant forthwith to execute and deliver the necessary power or powers of attorney for the purpose of passing transfer of all the right, title, interest and share heretofore held by her in the landed property forming assets of the said partnership;

(*b*) An order authorising the passing of such transfer without the production of the defendant's power or powers of attorney in case the defendant shall fail to comply with such first-mentioned order.

And as executor of the late Edward Atmore the plaintiff prays for:

(*c*) An order compelling the defendant forthwith to produce as an asset of the estate of the late Edward Atmore and join with the plaintiff in investing in terms of the said will the sum of £830 aforesaid; or in the alternative,

(*d*) An order compelling the defendant forthwith to pay over to the Master of this Honourable Court the said sum of £830 to be held by him for her benefit as usufructuary and thereafter for the aforesaid minor child of the late Edward Atmore.

(*e*) And the plaintiff further prays for such further or other relief in the premises as to this Honourable Court may seem meet together with costs of suit against the defendant *de bonis propriis*.

The following was the plea of the defendant, Rebecca Chaddock, assisted by her husband, George Chaddock:

1. She admits the allegations in the 1st, 2nd, 3rd, and 5th, paragraphs of the declaration.

2. As to the 6th and 7th paragraphs she refers this Honourable Court to the will of the said Edward Atmore, a copy of which is annexed to the plea filed by the *curator ad litem* in this case.

3. She admits that she refuses to transfer to the plaintiff, or to cause to be transferred to him, the landed property referred to in the 4th paragraph of the declaration; but she denies the other allegations in the said paragraph and she admits that she has not as yet invested the sum of £830 referred to in paragraph 7 of the declaration as directed by the will of her late husband.

4. She submits that she is justified in refusing to pass transfer of the property aforesaid, or to invest the said sum of £830 as the ascertained amount due by the partnership referred to in the declaration to the estate of her late husband until the rights of her minor child as raised in the plea of her *curator ad litem* have been finally decided according to law.

5. She submits herself to the judgment of this Honourable Court in the premises and prays that she may be declared entitled to her costs.

The following was the plea of the intervening defendant and his claim in reconvention;

1. The said Clarkson Henry Tredgold was duly appointed *curator ad litem* to the minor child of the late Edward Atmore and his wife Rebecca Atmore (now Chaddock) on the 14th day of February, 1894, with power to intervene in this suit.

2. He admits the allegations in paragraphs 1, 2, 3, and 5 of the declaration.

3. He admits that the original defendant refuses and neglects to cause the transfer referred to to be made, but denies the rest of the allegations in paragraph 4.

4. As to paragraphs 6, 7 and 8, he craves leave to refer this Honourable Court to the will of the late Edward Atmore hereunto annexed, which the defendant prays may be considered as inserted herein. He admits that in terms of the said will certain moneys should be invested as in paragraph 6 alleged, but denies that the said sum of £830 is part of those moneys.

5. The said late Edward Atmore died on the 16th day of October, 1881, in the Cape Colony, leaving a last will and testament, his said last will being already hereunto annexed, at which date the said late Edward Atmore was domiciled in England and not in this colony.

6. The said minor child is the sole and only child of the said Edward Atmore and as such his heir at law.

7. The said Edward Atmore in his aforesaid will purported to deal with and dispose of his movable and personal estate and effects only, but did not dispose of or deal with his landed property or real estate.

8. At the date of his death the said Edward Atmore was possessed of certain landed property, to wit, a certain share in a piece of ground, together with buildings thereon and fixtures, situated at Woodstock in the Cape Division, belonging to him, by virtue of partnership subsisting at that date between him, the said Edward Atmore and the plaintiff, the said ground, buildings and fixtures being part of the partnership assets. This property devolved upon and became the property of the said minor child at his death.

9. In violation of the rights of the said minor the original defendant, Rebecca Chaddock, wrongfully and unlawfully procured and obtained the registration of the said share of landed property in her the said Rebecca Chaddock's own name, and in further violation

of the rights of the said minor the said plaintiff and the said original defendant wrongfully and unlawfully purported to deal with the said landed property in the manner set out in the declaration and annexure thereto.

Wherefore the *curator ad litem* to the said minor prays that the plaintiff's claim may be dismissed with costs *de bonis propriis*.

And for a claim in reconvention the *curator ad litem* of the minor child of the said late Edward Atmore, now plaintiff, says:

1. He craves leave to refer this Honourable Court to the facts admitted in the declaration, and those set out in the above plea and in the annexures thereto.

2. At the death of the said Edward Atmore there became due and payable a certain sum of money, to wit the sum of £942 11s. 6d., by virtue of a policy of life insurance effected upon the life of the said Edward Atmore, which sum of money should have been invested in a manner more fully set out in the annexed will of the said Edward Atmore for the benefit of the minor child, together with a sum of money, to wit, £303 2s. 8d., which the said Edward Atmore died possessed of, but the said executors have failed and still fail and neglect to invest the said sums of money as directed.

3. Subsequent to the death of said Edward Atmore his executors prepared and filed with the Master of this Honourable Court two accounts purporting to be liquidation and distribution accounts in the said Edward Atmore's estate, but these accounts are incorrectly and improperly framed, in that in the first account a certain sum of money, to wit, £480, is alleged to be due and to have been paid to John Joseph Atmore which sum in truth and reality was not so due and payable, and further the value of the said Edward Atmore's share in the partnership subsisting between himself and the defendant, the plaintiff in convention, is not brought up nor accounted for.

Wherefore the plaintiff in reconvention prays for:

(*a*) An order compelling the defendant, the plaintiff in convention, assisted by his co-executrix, the original defendant in convention, to pass transfer to the said minor of all the landed property and real estate of which the testator was possessed at the time of his death.

(*b*) An order compelling the defendants in reconvention as above, to invest in trust for the benefit of the said minor the money and the securities for money of which the testator, the said Edward Atmore, was possessed at the time of his death, together with the proceeds of the policy of life insurance aforesaid, to wit the sum of £303 2s. 6d., or such sum as may be found to have belonged to the testator at his death, and the sum of £942 11s. 6d.

(*c*) An order compelling the said executor to file a true and proper account in the estate of the said late Edward Atmore.

(*d*) Such other and alternative relief as may to this Honourable Court seem meet, together with costs of suit against the defendants in reconvention *de bonis propriis*.

The plaintiff's replication to plea of defendant Rebecca Chaddock was general.

The replication to the plea of the *curator ad litem* was as follows:

1. He admits paragraph 1.

2. He admits that the document annexed to the plea and referred to in paragraph 4 thereof is a copy of the last will of the said Edward Atmore. He denies the other allegations in paragraph 4.

3. As to paragraph 5, he admits that the said Edward Atmore died on the 16th October, 1881, in this colony, but he denies that he was domiciled in England, and says that he was domiciled in this colony.

4. As to paragraph 6, he admits that the said minor is the only child of the said Edward Atmore, but he denies the other allegations in the said paragraph.

5. As to paragraph 7, he says that at the date of the execution of the said will the said Edward Atmore did not possess any landed property or interest therein;—for the terms of the said will he craves leave to refer to the copy annexed to the plea.

6. As to paragraph 8, he admits that at the date of his death the said Edward Atmore was the registered owner of certain landed property at Woodstock; that the value of the said property was the sum of £206 or thereabouts; that the plaintiff was entitled to a half share in the said property: that the said land was purchased in or about 1881, on joint account of the said Edward Atmore and the plaintiff. At the said date and up to the death of the said Edward Atmore a partnership subsisted between him and the plaintiff, and the said ground and the buildings in course of erection thereupon were portion of the partnership assets. He denies the other allegations in the said paragraph.

7. He says that at the date of the death of the said Edward Atmore his liabilities largely exceeded his assets (excluding from the said assets the proceeds of his life policy hereafter referred to) as will appear from the liquidation account filed in his estate: in the said account the sum of £304 18s. 8d. owing by him at his

death to his brother Robert Atmore, and the sum of £32 advanced to him by plaintiff, were by mistake omitted.

8. After the death of the said Edward Atmore, and in order the better to provide for and maintain the first defendant and the minor child, and to liquidate and settle the liabilities of the said Edward Atmore, an arrangment was made by which, *inter alia*, it was agreed that the first defendant should take transfer of the said landed property registered in the name of the said Edward Atmore, and should enter into partnership in a milling business upon the said property with the plaintiff. The said partnership commenced in or about October, 1882, and an agreement relative thereto was in or about November, 1884, reduced to witing. At the date of the said Edward Atmore's death he owed the plaintiff the sum of £480, and his estate was unable to pay the same. The above settlement and arrangement was arrived at in the interests of the first defendant and the said minor.

9. On or about the 5th day of May, 1882, a sum of £942 11s. 6d., being the proceeds of the life policy of the said Edward Atmore, was received by the first-named defendant from an executor dative in England appointed for the purpose of receiving the said fund, and after payment of certain debts still due by the estate of the said Edward Atmore there remained a sum of £830, which the first-named defendant invested in the partnership, she being entitled to the usufruct thereof. The said sum was thereafter paid in terms of the agreement dissolving the said partnership, the first defendant being entitled to the usufruct thereof, and the said minor being entitled to the capital at the death of the first-named defendant.

10. By virtue of the above the plaintiff is now entitled to demand transfer of the said landed property as in the declaration claimed, to enforce the conditions of the agreement of dissolution of the said partnership, and to call upon the first defendant to deal with the said sum of £830 in terms of the said will.

Wherefore the plaintiff again prays for judgment with costs.

And for a plea to the claim in reconvention of the said *curator ad litem* the plaintiff, now defendant in reconvention, says:

1. He craves leave to refer to the matters above pleaded.

2. Save as above admitted he denies specifically the allegations of fact in paragraphs 2 and 3 of the said claim, and says that the account filed is correct save that the amounts of £304 18s. owing by the estate of the said Edward Atmore to his brother Robert Atmore and the sum of £32 due to the said plaintiff, now defendant in reconvention, are not brought up therein by mistake. Wherefore he prays that the claim of the plaintiff in reconvention be dismissed with costs.

The following are the relevant portions of the will annexed to the plea:

This is the last will and testament of me Edward Atmore, of Carbrook in the county of Norfolk, miller. I appoint my wife Rebecca Atmore the executrix and my brother John Atmore of Hingham in the said county, miller, executor of this my will. I give and bequeath unto my said wife Rebecca Atmore all my household furniture, plate, linen, china, live and dead farming stock, book and other debts, and all other my personal estate and effects whatsoever and wheresoever except money and securities for money. To hold the same to her my said wife for her own use and benefit. I give and bequeath all my money and securities for money including any life policy of insurance I may have (subject to the payment of my just debts, funeral and testamentary expenses) unto my said executrix and executor hereafter called my trustees upon trust in their discretion to permit my said moneys invested at my decease in or upon any stocks, fund shares or securities yielding interest to continue in the same state of investment but subject to such discretionary power. I direct them to invest the same in their names in or upon any of the public stocks, funds or securities of the United Kingdom or India, or any colony of the United Kingdom or any foreign country or State, or upon any real or leasehold securities in England or Wales, or on the stocks, funds, shares, debentures, mortgages or securities of any corporation, company or public body municipal or otherwise in the United Kingdom, or any foreign country or State, or upon any real securities in any foreign country, and may from time to time with the consent in writing of the person entitled to the life income thereof vary and transpose the investment from time to time for any other investment of the description aforesaid, and upon further trust to permit and empower my said wife Rebecca Atmore to receive the annual income of the said moneys and the stocks, funds and securities whereon the same shall be invested during the term of her natural life, and from and after her decease upon trust to divide the same moneys, stocks, funds and securities and the annual income thenceforth to accrue due for the same unto and equally between my children if more than one, and if only one then to such only child who shall be living at the death of my said wife and the issue of any of them who may have departed this life, such issue to take equally between themselves if more than one the share such parent would have taken if living.

Upon these pleadings issue was joined.

Mr. Searle, Q.C. (with whom was Mr. Graham), appeared for the plaintiff.

Mr. Tredgold appeared as *curator ad litem* for the minor child.

Mr. Innes, Q.C, appeared for the defendant, Rebecca Chaddock, to submit to the order of the Court.

John Joseph Atmore, miller, Woodstock, the plaintiff, said that the defendant was his sister-in-law. The late Edward Atmore was his brother, and he and his brother had married sisters. Their father came to the Colony in 1851. There were four sons—Robert, Edward, John Joseph, and William. In 1869 the whole family went to England to receive money left to his mother. His mother died shortly after their arrival, and the money became due to the children. It was not until 1880 that the money was paid. Edward Atmore was born in 1853. In England his father went into business at Norfolk. Edward married in England in 1878, and started a mill. About £1,500 was paid to each son under the will, and soon after the money was received, the whole family came back to the Colony. Edward had lost money by his business in England, and he completely wound it up before leaving. Edward's life was insured for £1,000. In England witness lent his brother Edward £683, and then he and Edward entered into partnership, to be carried on at the Cape. Machinery to the value of £200 was bought in England for the business. They all landed at the Cape in February, 1881. The £683 he lent to his brother was in two sums, but of the latter cheque of £394, he found that about £200 had been given by his brother to their father, and witness never charged that amount to his brother, but always looked upon the total debt as £480. When they landed at the Cape four plots of land were bought for £32, transferred to the names of Edward and John Atmore. The piece of ground on which the house and mill now stand was also bought for £60. The whole family had decided to settle in the Cape. Edward died in October, 1881, leaving his wife, the defendant, and a child; and their father died in 1882. At the date of Edward's death the windmill was in course of erection, and the house was also begun. A Divisional Council valuation of the land and buildings was made in August, 1881, at £706. They had paid far too much for the ground they had bought. The life policy brought £946 11s. 6d., and that money was forwarded to the Cape in May, 1882. It was sent to Edward's widow, and she with witness carried on the business. After Edward's death two other pieces of land were bought in the name of the firm. Afterwards there was a transference of the properties to the names of Rachael and John Atmore. Without the life policy Edward's estate would have been insolvent. The assets in the estate, including the life policy, were £1,395 13s. 8d. Robert Atmore had advanced to the deceased brother £609, which liability witness had discharged. The balance for distribution on a reckoning of Edward's estate was £438 8s. 2d. In 1884 there was a partnership agreement drawn up between witness and the defendant. It was desired at that time to obtain a bond upon the land for £1,000. In the latter part of 1884 the defendant went to England and returned in 1885. On the steamer she formed the acquaintance of Captain Chaddock, who came to the Colony in 1888, and great friction took place. Chaddock wanted to marry the defendant and come into the business, and he objected, as Chaddock had neither experience nor money. A dissolution of partnership followed, upon which he paid £854 as due to the minor child of Edward. In 1894 the first objection was made to the payment to the minor. If he had acted not strictly in accordance with the will it was through ignorance. It was untrue that he and Mr. Moore had drawn up an account in a certain way on purpose to defraud the Government. He had not in 1888 offered to pay his sister-in-law £1,500 to leave the business—in fact the business at that time was not paying its way, and if it had not been for outside help he would then have been obliged to surrender the estate.

Cross-examined by Mr. Tredgold: Robert Atmore's debt had been repaid. He was sure they went to England in 1869 to draw the money, which was not payable until after 1880, though he did not think it was known when they left that they would have to wait until 1880. He had never heard that the defendant had married his brother on the understanding that he should not go back to the Cape. His brother Edward had not been always anxious to return to England. The brickwork of the windmill cost about £90 to put up, but the completed windmill was worth between £1,000 and £1,500. In England Edward had never spoken to him about advancing money to their father. After the death of Edward the money in the bank was continued in the bank as before. Although he was executor he had not read the will until 1883. He had not read it on the day of Edward's funeral. The £32, the last premium on Edward's insurance was paid out of the partnership money. If he had carried out the terms of the will at the date of the death the firm would have gone insolvent.

Re-examined: He and Edward had about £1,000 when they commenced the partnership. The £90 for the windmill was the cost of building only. He provided the bricks, and they cost £2 per thousand.

Thomas Healey, Woodstock, said he had lived there since 1878. He knew the land the Atmores bought in 1881. When Edward died the mill was about three-fourths erected, and the house was about 3 feet high. The land, for which £92 had been given, was not at the time worth £30. At the time of Edward's death he thought the value of the land and buildings was about £275. He tendered to build the mill for £105—labour only.

Cross-examined by Mr. Tredgold: He did not agree that Divisional Council valuations were always below what the properties would fetch. He would sell his property for what it was valued at.

Robert William Atmore, eldest brother of the plaintiff, said he came out in 1881 with the family. He had advanced about £600 to the firm of E. and J. Atmore before Edward died, and £400 afterwards. The money had been repaid.

Cross-examined by Mr. Tredgold: He was a miller, and worked for his brother. When he was living with the family, his contribution to his maintenance was his labour. The money he had lent them had not been payment for board and lodgings.

Mr. W. E. Moore, attorney for Mr. Atmore, said he had first known the plaintiff when he became a Councillor of the Woodstock Municipality in 1882. The administration account had been drawn in his office, and also the dissolution of partnership agreement. It was untrue that he had offered the defendant £1,500 out of the partnership if she married Chaddock.

Cross-examined: He had not seen the will before the administration account was drawn up. His managing clerk drew up the administration account.

Mr. L. H. Brown, clerk, Standard Bank, produced a statement of moneys transferred from the account of R. W. Atmore to the partnership of E. and J. Atmore—a total of £605 16s. up to 1881.

Postea (June 9th).

After argument.

The Chief Justice said: Mr. Tredgold was fully justified by his duty to the minor, of whom he is the *curator ad litem*, in claiming a larger sum than that suggested by the Court as reasonable. Some of the facts mentioned would seem to indicate that the minor is entitled to claim that more than £830 shall be invested on her behalf by the administrators, but taking all the facts into consideration the Court is of opinion that the sum mentioned fairly represents what is due to the minor. In its main features our law relating to the liability of executors, administrators and other persons holding a like fiduciary position does not differ materially from the law of England as stated during the argument. Where the administrators have dealt improperly with the trust funds which it was their duty to invest in a particular way the beneficiaries can elect whether they shall claim the sum which would have been due if the investments had been properly made, or whether they shall claim the full sums realised by means of the unauthorised dealings. In the former case they would not be entitled, as by the English law, to compound interest, but to such interest as the proper investments would have realised. In the latter case the profits made may be claimed although exceeding the amount of interest which would have been realised by a proper investment. One of the administrators in the present case is the minor's mother and the surviving spouse of the minor's father. The marriage had been contracted in England at a time when both parties were domiciled in England, and there is no ground, therefore, for holding that community of property existed. But even if the marriage had been in community the minor would have been entitled to claim her paternal portion, either as it stood at the time of her father's death or as increased by reason of her mother's unauthorised investment of the money in a partnership business entered into by her with her co-administrator. To such an extent were the rights of children recognised by the customs of various parts of the Netherlands that, in the absence of a proper account or of a due compliance with the will of the deceased parent, the children were entitled, under circumstances similar to the present, to claim a share in all acquisitions made by the surviving spouse even though not derived by way of profit from the joint estate itself (*Voet* 24, 3, 30; *Holl. Cons.* Vol. 2, Cons. 274). On the dissolution, in the present case, of the partnership between the two executors the sum of £250 was paid by the plaintiff Atmore to the defendant Mrs. Chaddock (as the share to which she was entitled unburthened under the will) and the sum of £330 as the minor's share subject to the mother's life usufruct. The latter sum fairly represents what is due to the minor, whether the value of the testator's estate as it stood at the time of his death, or the assets of the partnership at the date of its dissolution be taken as the basis of computation. The payments were made by Atmore to

Mrs. Chaddock on condition that she transferred to him the landed property of the partnership. The Court will therefore order her to transfer the land to the plaintiff Atmore, but in order to safeguard the rights of the minor the order must be subject to the condition that the transfer be not completed until Atmore shall have paid into the Guardians' Fund the sum of £830 to the credit of the minor, with leave to him to apply to the Court for a reduction of the amount upon satisfactory proof of the due investment of the minor's money, in whole or in part, in terms of her father's will. As co-administrator of the defendant (Mrs. Chaddock), the plaintiff is also entitled to an order compelling her to produce as an asset in the testator's estate the sum of £830 paid over to her and to join with him in investing the money in the manner directed by the will. In regard to the minor's claim against both executors—which could only be allowed to be made by way of claim in reconvention because all parties consented to the course—she is clearly entitled to an order compelling the plaintiff and defendant in convention to invest the sum of £830 for the benefit of the minor in the manner directed by the will. The defendant Mrs. Chaddock is primarily liable for all the costs of this action, but failing payment by her of the minor's costs the same must be paid by the plaintiff.

Mr. Justice Buchanan concurred. There seemed to him to have been gross irregularity in the administration of this estate. If executors do not carry out the terms of the will, but deal with property in the way it was dealt with in this case, they must expect no mercy at the hands of the Court. The minor was entitled to the full benefit of the value of her estate, which had been used for the purposes of trade.

Mr. Justice Maasdorp also concurred.

[Plaintiff's Attorney, W. E. Moore: Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

REGINA V. BALLIE.

Mr. Justice Buchanan said that, as judge of the week, the case of Jan Ballie and three other prisoners, who had been before the Resident Magistrate of Oudtshoorn on a charge of sheep-stealing, had come before him. All the prisoners had pleaded not guilty, and two had been found guilty. The records were submitted to the Attorney-General, who was not prepared to support the conviction. There was not sufficient evidence to support the conviction, and it would therefore be quashed.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

GIBSON V. KNIGHT. { 1896. May 28th.

Mr. Smuts moved for confirmation of the arrest of the defendant who owed the plaintiff over £27, and had taken out a berth on the Trojan to go to England.

Plaintiff confessed the debt, and judgment was given for the amount; defendant being discharged from custody.

RATHFELDER V. HELM.

Mr. Close applied for provisional sentence on a mortgage bond of £1,600 and interest, less £700 paid on account, and that the property might be declared excutable.

Granted.

ADMISSIONS.

On the application of Mr. Buchanan, Gerald James O'Reilly was admitted attorney, notary, and conveyancer.

On the application of Mr. Close, Edward James Wood was admitted attorney and notary.

ADONIS V. DU TOIT { 1896. May 28th.

Trespass—Damage by cattle—Liability—Negligence—Vindictive damages.

Cattle belonging to D. *trespassed upon* A.'s *land owing to* D.'s *carelessness, and considerably damaged a hay stack.*

Held that *as the damage was due to mere carelessness on* D.'s *part and not to any vindictive act* A. *was not entitled to vindictive damages.*

This was an action brought against the defendants by the plaintiff for damages for trespass on the farm Nederland, in the Malmesbury district, it being alleged that cattle belonging to the defendants were allowed to stray upon the land of the plaintiff.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer, residing on portion of the farm Nederland, in the division of Malmesbury, leased by him from one M

van der Westhuizen. The defendants are farmers, residing at Klein Vlei in the division of Malmesbury.

2. The plaintiff says that in or about the month of January, 1896, the defendants trespassed upon that portion of the farm Nederland hired by him as aforesaid with their cattle, and the said cattle did destroy large quantities of oathay and rye belonging to the plaintiff to the value of £60.

3. In consequenee of the said wrongful and unlawful trespass the plaintiff has sustained damages in the sum of £60.

The plaintiff claims:

(*a*) For judgment in the sum of £60.

(*b*) Alternative relief.

(*c*) Costs of suit.

As a plea to plaintiffs' claim the defendants said:

1. They admit paragraph 1 of the declaration.

2. As to paragraph 2 of the declaration, they admit that their cattle did on one occasion without their knowledge and against their will stray on to the ground leased by plaintiff and commit some damage to the stack thereon; but they deny that the damage was as great as alleged in plaintiff's declaration.

3. They say that part of the damage which plaintiff has suffered was caused by plaintiff's own negligence in that he absented himself from his farm without having taken any measures to protect his stack against damage; also that part of the damage was caused by the trespass of cattle belonging to people other than the defendants.

4. They deny the allegations of paragraphs 3 and 4 of the declaration, and say that they have tendered, and still tender plaintiff the sum of ten guineas as a fair and reasonable compensation for all damage that may have been done by their cattle in the trespass aforesaid, but plaintiff refuses to accept the same.

Wherefore they pray the plaintiff's claim over and above the sum of £10 10s. sterling may be dismissed with costs.

The plaintiff's replication was as follows:

He admits that on or about the 2nd day of May, 1896, the defendants tendered the sum of £10, as and for damages sustained by the plaintiff, and he admits that he refused to accept the said sum of £10, as being wholly inadequate. Otherwise the replication was general.

On these plea lings issue was joined.

Mr. Graham for plaintiff; Mr. Smuts for defendants.

John Adonis, the plaintiff, said he had lived on the farm Nederland four years. He paid a rental of £8 a year. He cultivated the land. Previously he had farmed other lands also in the Malmesbury district. Last year he sowed forty muids of oats and one and a half muids of rye. The crops were good this year. He commenced to reap on November 1 last. It took him more than a month to plough his land. He stacked his crops. Jan van Wyk assisted him to do so. When witness came home just before Christmas he was told that the cattle of the defendants had trespassed on his land. The cattle—seven oxen—belonged to Mr. Du Toit. The two Du Toits were there together. Witness pointed out the damage done to the stock, when they asked him what he was doing to allow the oxen to stray; he should look after his land. Witness put rails around the stack. Witness asked Mr. Du Toit's herd to look after the cattle. The cattle had trespassed while the witness was away taking his children to school. All his oathay was destroyed; not a single bundle was left. It was all trodden down. One load of rye was also destroyed. Witness got nothing at all out of Mr. Du Toit. He only had two loads of rye left, and in consequence of the damage had been this year unable to pay his rent.

Cross-examined: Witness sowed forty muids of oats. His wagon was one of ordinary size. Van Wyk assisted witness to off-load the oats. The stack was about thirty yards from the door of the farm. When witness left home the farm was left in charge of Van Wyk and his wife.

Jap van Wyk corroborated. The crops were good, and the sheaves were good, fair sheaves. The rick was properly constructed, and a fence was afterwards put around it. The cattle belonged to Messrs. Du Toit. When they were driven away they went straight to the farm.

Cross-examined: The stack was about twenty yards long, ten yards broad, and ten feet high. He knew the cattle belonged to the Du Toits, because he had seen them in the kraal.

Johannes Persens said that he was a shepherd in the employ of Mr. Basson. He knew the piece of land in question. The cattle were the property of the defendants. He knew them well. Plaintiff asked witness and Mr. Du Toit's herd to look after the stack whilst he was away. Witness had driven the cattle off the land, and saw the cattle pulling the stack about. Witness drove the cattle off the land several times.

Cross-examined: Witness had worked for a brother of the defendants. He knew that some of the cattle were the property of Messrs. Du Toit because he had seen them on the farm. Plaintiff gave witness 4s. in advance to look after the stack whilst he was away at Malmesbury.

Mrs. Van Wyk said she lived with her husband on plaintiff's premises. Witness looked after the six children of the plaintiff. She knew the cattle to be the property of the Du Toits, and remembered their destroying the rick. The rick was fenced in, but the cattle broke down the fence.

Balthazar Volsteedt, market-master, Cape Town, gave evidence as to the market price of forage. Five thousand pounds was a fair load.

For the defence.

Andries Petrus du Toit said that plaintiff had told him that his cattle were doing damage. Witness told plaintiff to drive them off his place. Witness had seen other cattle not belonging either to his brother or himself at the stack belonging to plaintiff. Witness and his brother were both well-to-do farmers, and owned sixty cattle between them.

Jacobus Louw said that during January he saw cattle near the plaintiff's stack. This was only upon one occasion. He should value the stack at about £10. It was eight paces long and six broad. He estimated there would be about four loads in it.

Cross-examined by Mr. Graham: Witness measured the rick after the cattle had been at it.

Johannes Smit said he saw the cattle at the stack in question but they were cattle he had never seen before. There were seven or eight. One of the defendants was son-in-law of witness. Witness did not notice whether the stack was fenced in. He could not say where defendants' cattle fed.

Jacobus Abraham Smuts corroborated the evidence of the last witness. He would not have given £10 for the stack on the day that he saw it.

Cross-examined: Witness had not sold forage this year. The stack was about fifteen yards from the road and was not fenced in on "Old Year's Day" when witness passed. There had been no cattle at the stack when witness passed.

AFTERNOON SITTING.

[Before Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

Mr. Graham for the plaintiff Adonis urged that actual damage will not be the guide in a case such as this. See **Stuurman* v. *Van Rooyen* (3 Sheil, 32) as to damages in Tort and *De Villiers* v. *Van Zyl* (Foord, 77). It is a custom in Malmesbury that as soon as the rick is up the cattle are allowed to wander all over the lands. The plaintiff and friends swear a dozen loads were put on the stack; the crops had been very good. Then before damage was done the plaintiff warned defendants, but they took up the attitude that the cattle were entitled to roam. If the rick had not been demolished the plaintiff could have sold in the recent exceedingly good market. The rick has been completely demolished and it is clear that a herd attacked the rick and cleared it. The plaintiff fenced his rick, especially engaged men to watch and begged the herd to keep the cattle in. The plea of contributory negligence cannot be in any way upheld.

Mr. Smuts for the defendant: In English law the trespasser goes at his peril: in our law (derived from the *Lex Aquilia*) negligence must be clearly proved. The evidence shows that the plaintiff fell below the ordinary standard, the defendants were above it.

Mr. Graham in reply contended that in our law cases in trespass do not depend on whether negligence has been proved. See *Graan* v. *During* (2 Juta, 308). Even at the market-master's figures on the date of destruction the twelve loads of 4,000 lb. were at least worth £80. Unfortunately we only claim £60, though we would have been entitled to the £80 at least.

Mr. Justice Buchanan said: The plaintiff in this case complains that defendants trespassed upon his farm by their cattle and destroyed a large quantity of oathay and rye there situated. For this trespass the plaintiff claims £60. The defendants in their plea admit the trespass, but allege that the whole of the damage suffered by the plaintiff was not caused by their cattle but only part, and tender ten guineas. The question therefore reduces itself to the simple issue whether the amount of the damages tendered is sufficient or not to cover the liability the defendants admit in the pleadings. With reference to the amount of the tender, plaintiff's evidence goes to show that he had a considerable quantity of oathay and rye on his farm, but I am not prepared to say that the amount he says he stacked is quite so large as he puts it; but at the same time it would appear that it was considerably more than defendants would allow. The plaintiff was not at his farm after the hay was stacked, consequently he was unable to show in what way the damage was caused. His principal witness was also absent from the farm during a part of the time the damage was done. The herd of a neighbouring farmer, Mr. Basson, says that on four different occasions he saw defendants' cattle trespass on the farm and destroy the oathay.

* 10 J,. 35.

The evidence goes to show that other cattle were also on the farm. Mr. Louw says he has seen Mr. Myburgh's cattle on the farm, and on one occasion some donkeys and mules. The whole of the tenour of the evidence to my mind shows that the damage suffered by the plaintiff was not altogether so large as he makes out. Under these circumstances I think the defendants ought not to pay more damages than is due to the act of themselves or of their servants or cattle. The only question that remains is as to the culpability of the defendants, and as to vindictive damages or otherwise. I do not think it would be right after hearing the evidence to give vindictive damages. It appears to my mind that the damage to the oathay was caused by the mere carelessness of the defendants, and not by a vindictive act on their part. Taking all the circumstances into consideration, I think there will be no injustice to the defendants if a verdict of £30 damages and costs is given. The tender of ten guineas is too low.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorney, V. A. van der Byl.]

VAN DER POEL V. VAN DER POEL. { 1896. May 28th.

This was an undefended action for divorce brought by Albertus Dirk Petrus van der Poel, an attorney, of George. The parties were married on July 15, 1886, and there are four children of the marriage. The defendant admitted the charge brought against her, and submitted herself to the judgment of the Court.

Mr. Jones appeared for the plaintiff.

Albertus Dirk Petrus van der Poel said that he was married on July 15, 1886. He had lived happily with his wife until February, 1895, when he heard that she had committed adultery. At that time she had been away three months, first at Caledon and afterwards at Cape Town. She stayed with witness's sister in Cape Town. Shortly after his wife came home his mother wrote to him a letter which he read to his wife. His wife denied the charge contained in the letter, and said she had had nothing to do with the man Visser in March, 1895, or with one Voges in February, 1895.

Susan van der Byl identified Mrs. Van der Poel from a photograph produced, and proved the charges of adultery.

A decree was granted in terms of the declaration dissolving the marriage, and the custody of the children was given to plaintiff.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

HABIG V. HABIG.

This was an action brought by Johannes Andries Habig for restitution of conjugal rights. The parties were married at the Paarl in March, 1886.

Mr. Molteno appeared for the plaintiff.

Johannes Andries Habig said he was married at the Paarl in March, 1886. He identified the signatures in the book produced as being in the handwriting of himself and his wife. Witness was married by ante-nuptial contract. He was a widower and his wife was a widow when they married. They lived happily together for about three months when his wife, who was possessed of property, turned him out of the house. The house was his wife's. Plaintiff was a carpenter by trade and his wife was a shopkeeper. Witness then settled down in the Transvaal at Krugersdorp, and was making a good living. He could support his wife and family. He sent his wife a message five years ago asking her to live with him, and offering to pay her fare up-country.

Norman Lacy, of the Deeds Office, produced the official record of the marriage.

An order was made calling upon the defendant to return to her husband on or before June 15, failing which to show cause on June 30 why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. J. C. Berrangé & Son.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

DE KLERCK V. WINTERBACH AND ANOTHER. { 1896. May 29th.

(*See* De Klerck v Zeeman *infra.*)

Insolvency—Proof of Debt—Cession of a Bond—Ordinance 6, 1843—Sections 27 and 130.

This was an application on notice calling on the respondent Winterbach and the trustee in the insolvent estate of one Le Roux to show cause why certain claim on a bond proved by Winterbach in the insolvent estate should not be

expunged by reason that the Resident Magistrate had admitted it without the sufficient proof required by law in that the particulars and dates of the debts were not stated in the affidavit as required nor was there any proof of cession. Mr. Smuts for applicants; Mr. Searle for respondent.

The facts were that Le Roux had been previously insolvent, and the Worcester Commercial Bank the then holders of the bond proved their claim at the time and subsequently it was alleged ceded the bond to Winterbach. Le Roux was not rehabilitated but became insolvent a second time, and Winterbach's proof of debt on the (alleged) ceded bond was admitted by the Resident Magistrate.

Mr. Smuts said: The application is based on section 27, Ordinance 6 of 1843. The creditor wishing to file proof of debt *must* (imperative) file vouchers and swear to genuineness. This was not done. Two questions must be dissevered the evidence for Resident Magistrate to justify him in admitting the proof and evidence for Court to-day. This is important as to costs, for later evidence is produced by respondent for this application.

The real ground for our objection is that Winterbach having elected to prove (as by his affidavit) under section 130 of the Insolvent Ordinance on the previous confirmed account he cannot afterwards recede from that and rely on the previous mortgage bond debt. See section 98, Ordinance 6 of 1843; *In re Flint* (1 Ros., 428); *Kotze* v *Wentzel* (4 E.D.C., 2).

Winterbach ought originally to have made his choice. If he wanted to claim on the bond he ought to have sworn to the cession of the bond, or rely on section 130. He chose the right under section 130, therefore everything ought to be struck out except £111 1s. 3d. The 130th section does not override the 27th, and we contend there was no proper proof under the latter.

Some also of the claims are supported by vouchers with dates of the present month. The 27th section demands dates to be given for the voucher with the affidavit.

Mr. Searle: We must confine ourselves strictly to the notice of motion. There is much extraneous matter in the affidavit as to trustee selling to Winterbach at too low a price, as to trustee paying creditors to deprive them of votes. But Winterbach's proof is clearly on the bond.

The Chief Justice: I cannot understand how the Resident Magistrate admitted proof on the bond without proof of cession.

Mr. Searle: The practice appears to be that if no one specifically objects the Resident Magistrate admits if there is some proof of the debt on oath.

The Chief Justice: Under what section does your client claim?

Mr. Searle: Sections 27 and 130 together. We prove on the bond, deducting what has been paid under a prior bond. Section 27 in requiring production of vouchers does not refer to cessions. As to the question of cession as dealt with there the section only requires creditor to state "that it is just to the be t of his belief." There was no objection at the time of proof that the dates were not specified.

The Chief Justice said: There has been very great laxity in proofs of debt, I fear, especially by Magistrates in the country. On referring to the previous accounts in the previous insolvency of the same debtors, I find that items were admitted as proved which fairly astonished me. The trustee in the estate, the same trustee as in the present case, amongst others claimed auction commission for obtaining the sale of certain property of the insolvent estate, quite independent of his commission as trustee. It is extraordinary that no objection was taken by the Master to claims of that kind and I trust that in this present case, at all events no claim of this kind will be made by the trustee in respect of any property which may be sold by private sale to Winterbach or the applicant in this case. Coming to the objections, the main objection is that there was no proof before the Magistrate that the bond which was proved had been duly ceded to the respondent. In my opinion that is a fatal objection. The respondent produced no proof whatever before the Magistrate that he was the legal owner of the bond. The bond had been passed in favour of F. le Roux and had been ceded by him to the Commercial Bank at Worcester. It was proved by the Worcester Commercial Bank in the previous insolvency. Now the Court has already decided that under the 130th section the creditors who have proved in a previous insolvent estate may again prove in the case of a subsequent sequestration where the insolvent has not been rehabilitated. This power may produce great hardship and the least that can be expected is that the person who proves a bond, proved under similar circumstances should give clear proof that he is the legal owner. There was no proof before the Magistrate. The respondent simply produced a bond to which he has no right on the face of it, brings no cession, but simply says "I am the legal owner." The Magistrate should have had some proof that he was the

legal owner. Mr. Searle says "we produce a cession dated December, 1895," but there is no stamp upon the cession. The Act requires that any cession of a mortgage bond must be written either on stamped paper or on paper to which an adhesive stamp has been affixed, and this stamp must be cancelled. If those requirements had been complied with the Court would have been satisfied as to the perfect *bona fides* of the cession and would have known the date when the cession actually took place. It is quite competent for the Court under the Act of 1864 to admit the documents with a proper stamp and order a penalty not exceeding £20 to be paid. But I think it is not necessary to do that, because in my opinion this cession ought to have been produced before the Magistrate at the time of the proof of debt. Therefore we will take no notice of this and the opportunity can be given to the respondent to make a fresh proof of debt. The Court will order that the respondent should be authorised to prove this debt and will be enabled to reduce the amount of his claim by the amount by which he admits that it should be reduced and claim the proper interest. He must have this cession duly stamped if it requires a stamp and if there are penalties payable by virtue of not getting the Civil Commissioner to stamp it he will have to pay these penalties at the Civil Commissioner's office. He must produce proper documents before the Magistrate of proof of debt. The present pro f will be set aside with leave to prove again at the next meeting to be held on June 2. Winterbach will have to pay the costs of this application. As to the other proof of debt for £78 there are vouchers now and there will therefore be no order.

Their lordships concurred.

[Applicant's Attorney, G. M. Walker; Respondent's Attorneys, Messrs. Van Zyl & Buissinné].

DE KLERK V. ZEEMAN AND ANOTHER. { 1896. May 29th.

(*See* De Klerck v. Winterbach *supra.*)

Insolvency—Proof of debt—Unliquidated damages — Second insolvency — Section 130, Ordinance 6 of 1843.

A claim for unliquidated damages should be substantiated by action, and not proved as a debt, against an insolvent estate.

A proof against an insolvent estate under a second sequestration made by virtue of the 130th section of the Insolvent Ordinance should be in respect of the original debt and not of the account confirmed under the previous sequestration.

A bare proof for the alleged value of improvements made on an insolvent's land having been admitted and the account confirmed the insolvent surrendered his estate for a second time. The claim was again proved in the second insolvency, without any account or vouchers in support thereof. On the application of a creditor, who became such after the first insolvency, the Court ordered the proof of debt to be expunged, with leave to the respondent to substantiate his claim by action.

This was an application on notice of motion calling on respondents A. P. Zeeman and F. L. Lindenberg, trustee in the insolvent estate of F. D. le Roux, to show cause why a certain claim for £100 (with £54 interest thereon) admitted to proof in the said estate by the Resident Magistrate, Tulbagh, should not be expunged.

The applicant's affidavit set forth:

That he was a creditor in the said insolvent estate of Le Roux and has filed a claim for over £174, and that F. L. Lindenberg was confirmed trustee in the estate, which was sequestrated in January last.

That at the second meeting of creditors respondent's agent filed the claims of £100 and £54 in dispute, and the Resident Magistrate admitted them.

That the claim for £100 represents one which the respondent had proved on a prior sequestration of the estate in 1886. In the proof for £100 then filed by him he simply claimed the sum of £100 "for compensation for buildings and improvements on insolvent's farms." No dates or details being given. No interest was claimed, now interest (£54) is claimed and the cause of the claim is said to be the deficiency on the prior sequestration. The claim in the same form was also made in 1886 on the same day in the insolvent estate of P. C. le Roux.

Mr. Smuts for the applicant.

Mr. Searle, Q.C., for the respondent.

Mr. Smuts, for the applicant, stated that there was the same objection as to insufficiency of proof as in the preceding application against Winterbach, viz: no particulars or date. Moreover this is a claim for compensation, *i.e.*, for unliquidated damages for value of improvements. There is no basis for calculating. *Clarke* v. *Denny* (E.D.C., 300) and section 23,

Ordinance 6,1843, show the procedure where action has begun and insolvency intervenes. If the counter-claim for unliquidated damages cannot be set off (as set forth in *Clark* v. *Denny*) the converse would hold good by parity of reasoning. See *Redelinghuy's case* (3 Menz., 317). In any case there should be a *division* of the claim for compensation.

Mr. Searle: After the account is confirmed it becomes as a judgment, and raises a strong presumption that the amount claimed was due.

The Chief Justice: Yes, but section 130 puts parties just as if there had been no confirmation. Besides, what is a "debt" under section 27? Can you call an unliquidated claim a debt?

Mr. Searle: Section 27 does not limit claims in any such way.

The Chief Justice said: There is no obligation on the Master or Magistrate presiding at a meeting of creditors to admit a proof of debt merely because no objection is offered to it. A proof for instance, of a claim for unliquidated damages should not be admitted until the amount due has been fixed by judgment of a competent Court. That actions may be brought against insolvent estates for unliquidated damages was decided in *Clark* v. *Denny* (4 E.D.C., 300). The respondent's claim against Le Roux's insolvent estate was for the value of improvements made by him upon the insolvent's property. There was no account whatever showing the nature of the improvements, the amount expended upon them, or the tenure on which the respondent held the land when he made the improvements. It is said, however, that as the proof had been admitted in a prior insolvency of the same insolvent it was properly admitted in the subsequent insolvency. But the first proof was quite as unsatisfactory as the second. The Court has decided that, notwithstanding Act 38 of 1884, creditors under a former sequestration may prove whatever balance may still be due and owing to them, "just as if the last order for sequestration had been the only such order issued," but that decision does not justify the inference that merely because a proof has been admitted under the one sequestration, it must, if unpaid, be admitted in the next. On the contrary the concluding words, which I have just cited, of the 130th section of the Insolvent Ordinance show that no benefit can be derived by the alleged creditor from the fact that there has been a prior insolvency of the alleged debtor. The confirmation of the account in the first insolvency has not the effect of a final judgment as against persons who are creditors in the second insolvency only. It is the original debt only that can be proved under the second sequestration, after deducting any sums received in respect thereof. The Magistrate ought not, therefore, to have admitted the respondent's unsupported and vague claim, and the proof of debt must be expunged, with leave to the respondent to substantiate his claim by action in a competent Court.

Their lordships concurred.

[Applicant's Attorney, G. M. Walker: Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

MURPHY V. MURPHY. { 1896. May 29th.

This was an action for divorce and forfeiture of benefits in the community brought by the plaintiff on the ground of his wife's adultery.

Mr. Close appeared for the plaintiff.

Mr. Norman Lacy produced the certificate of the marriage of the parties on May 5, 1891.

Patrick Joseph Murphy said he married the defendant, then Mary Jane Keats, at Ceres in 1891 in community of property. He was mounted constable at Ceres. They lived together till May 22nd, 1893, then she came to Cape Town. When he was able to get leave in January 1894, he came here and found her but she only stayed with him a week and now she had gone to Johannesburg. In 1895 he learned that she was living at Tokai with one Lester and he was accordingly taken there by Mr. Lankester. He found her there staying in a house. She ran away into the plantation to avoid the neighbours hearing when he spoke to her and he took from the house a photograph of his wife and a soldier taken together. He had had troubles with her before but had forgiven her. She said she did not like living at Ceres. He had always been as good to her as a man could be.

Fred. Lankester said that he and his wife had visited the defendant at Tokai at her invitation. She was a connection of his by marriage. They found her staying in a house there with one Lester formerly a soldier, but then a constable at Tokai. They were on terms of great familiarity addressing each other by their christian names. Lester was the man in the photograph produced. They seemed to be living as husband and wife.

The case was postponed to enable further evidence of the adultery to be obtained.

Postea (June 5th).

The hearing of this action was resumed.

The following further evidence was taken:

Frederick James Humphreys, warder at Tokai, said he knew a man named Lester, who was there in 1895. The man in the photograph

produced was Lester; the woman who appeared in the photograph passed as Mrs. Lester. On pay-days Lester and the woman used to go into Wynberg. Lester got leave twice a week as a married constable. Mr. and Mrs. Lester occupied a small cottage, and were looked upon as man and wife.

The Court pronounced a decree of divorce.

[Plaintiff's Attorney, Gus. Trollip.]

BONNAR V. BONNAR.

This was an action brought by the plaintiff for restitution of conjugal rights against the defendant his wife failing which for divorce.

Mr. Buchanan appeared for the plaintiff.

James Bonnar the plaintiff said he was married in Natal in 1884. He had then known defendant two years. She lived in Natal and he at Umzimkulu, three days journey away. His wife had not liked to come to his farm when he married her. They stayed from January to October at the farm and all the time she was desiring to go to live in London. In December a child was born, his wife then having gone to her parents. A little later he asked her to return and hired a tent wagon, but she wrote to him that she was just leaving for England. She sailed and he had not seen her since. He had never seen the child. He desired struck out the clause in the ante-nuptial contract by which the survivor and child became universal heirs of the property on the death of the first-dying. His wife had means.

A decree of restitution of conjugal right was granted the defendant to return on or before the 15th August, failing which a rule *nisi* will be granted calling on her to show cause why the divorce should not be granted with forfeiture of the benefits under the ante-nuptial contract. The plaintiff must tender sufficient money to pay the passage of the defendant to the Colony No order as to costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

VORSTER V. ORSMOND. { 1896. May 29th. June 2nd.

Debate of accounts—Settlement by promissory note—Objections to accounts rendered—Removal of trial—Costs.

O. *rendered to* V. *an account for professional work done for* V. *This account not being clear* O. *rendered a second account which was fully debated between the parties and* V. *gave* O. *a promissory note in settlement of the amount then found to be due to him.*

On V. *suing* O. *for a proper account,*

Held that *the giving of the promissory note though not conclusive gave rise to a strong* prima facie *presumption (not rebutted by the evidence) of a settlement of the accounts on that date, and as the costs of suit were due to plaintiff insisting on having the account altered and removing the trial from the original court, judgment for defendant was given with costs, plaintiff not succeeding in obtaining any substantial alteration of the accounts.*

This was an action brought by Jacobus Adriaan Vorster, jun., against Everet George Orsmond, carrying on business under the style or firm of Sauer & Orsmond.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer residing in the district of Barkly East. The defendant is an attorney carrying on business at Aliwal North as an attorney, general agent, and auctioneer, under the style or firm of Sauer & Orsmond, and who at the dates hereinafter mentioned carried on business as aforesaid through duly authorised managers and agents at Barkly East.

2. At various times during the years 1890, 1891, 1892 and 1893, the plaintiff employed the defendant as his attorney, as a general agent, and as auctioneer, and the defendant through his duly authorised managers received and expended large sums for and on behalf of the plaintiff and in or about the work performed as aforesaid for the plaintiff.

3. In or about the beginning of the year 1891 the plaintiff entered into an agreement with the defendant, through his duly authorised manager, by which the latter undertook for valuable consideration to make the necessary arrangements for laying out the farm Tintern belonging to the plaintiff as a township; and it was agreed that the said farm should be surveyed into erven, that the defendant should sell the said erven, that the purchasers of the said erven should pay all conveyancer's charges, transfer duty, Government duty, auctioneers commission, costs of conditions of sale, *pro rata* share of advertising, costs of survey and diagram, and transfer expenses, and it was agreed between the parties that the defendant should pay the plaintiff the purchase price of the erven sold as for cash transactions, and that the plaintiff was not to be liable for adver-

tising or other expenses connected with the sale, which were to be recovered by the defendant from the purchasers. Thereupon the said farm was surveyed into erven and the plaintiff paid the surveyor the fees and costs of survey, and the defendant from time to time sold the same erven upon the terms and conditions agreed upon as aforesaid and the surveyor's charges which each purchaser was to pay was the sum of thirty shillings per erf.

4. It became and was the duty of the defendant upon the sale of each erf to recover and pay over to the plaintiff the sum of thirty shillings per erf and to pay over the purchase price, and to recover the *pro rata* share of advertising expenses and the other charges aforementioned from the purchasers.

5. The defendant from time to time paid certain sums of money to the plaintiff, but failed and neglected to render an account though requested so to do until July, 1893, when the defendant rendered an account in which the plaintiff is debited with sums to the amount of £6,624 6s. 9d., and credited with sums to the amount of £6 281 14s. 10d. Thereupon the plaintiff objected to the said account, and upon the representation of the defendant's manager that the items would be readjusted, the plaintiff left the said account with the said manager. Thereafter in the month of November, 1893, the defendant rendered another account in which the plaintiff is debited with sums to the extent of £3,119 10s. 4d. and credited with sums to the extent of £2 715 18s. 4d., or a difference in credit between the two accounts of £3,504 16s. 6d. Thereupon the defendant through his duly authorised manager, Arnold Richard Orsmond, represented to the plaintiff that the said account was a correct account, but that it would be debated, and that any errors or wrong entries in the said account would be adjusted, and moneys due or charged in error would be repaid to the plaintiff, and the latter being an illiterate man and unable to understand the said accounts, and being under the *bona fide* belief in the said representations, was induced thereby to sign a promissory note in favour of the defendant for the sum of £342 12s. the balance of the said account. In pursuance of the said premises the said note was renewed, and has since been paid and satisfied by the plaintiff.

6. The said accounts are wholly incorrect, misleading and unintelligible, and are unsupported by vouchers. The said balance was not and is not due by the plaintiff to the defendant. The said accounts do not show how many erven have been sold, or the various purchase amounts. The defendant has after repeated demands rendered to the plaintiff two lists of erven sold and the purchase amounts thereof, but the said lists do not agree with each other or with the amounts figuring in the two accounts.

7. The account secondly before mentioned contains several hundreds of pounds debited to the plaintiff which do not appear in account firstly before mentioned, yet the balance struck is the same within one penny.

8. The accounts do not show what amounts are due by the purchasers for survey expenses, or what interest is due by them to the seller or the dates upon which the various purchase amounts were received, but the defendant has charged the plaintiff with interest upon the purchase amounts received by him and paid over to the plaintiff. The accounts show large sums debited to the plaintiff for advertising, and the defendant has since the date of the said accounts rendered plaintiff another account in which he claims the further sum of £92 15s. 10d. from the plaintiff for advertising expenses.

9. The said accounts contain debit entries of what purport to be the price of the erven sold and are in many other respects wholly unintelligible.

10. The plaintiff has repeatedly called upon the defendant for an explanation of the said accounts, for vouchers for the several items, for a debate and readjustment of the said items, and repayment in accordance with the representations of the said Arnold Richard Orsmond, but the defendant, though the accounts contain items for work done as an attorney, as an agent, and as an auctioneer refuses to give any explanations of the said accounts, refuses to supply the necessary and proper vouchers, and refuses to debate the accounts or to adjust them, or to repay the plaintiff the sums wrongly charged.

The plaintiff claims:

(*a*) A proper account of all the work and labour done and moneys received and paid by the defendant as his attorney, general agent and auctioneer, duly supported by vouchers.

(*b*) A debate of the said account.

(*c*) Payment of all moneys which upon a debate of the said account will be found due to the plaintiff and wrongly charged with interest thereon.

(*d*) Alternative relief and costs of suit.

For a plea to the declaration the defendant said:

1. He admits the allegations in paragraphs 1 and 2, but save as is hereinafter admitted he denies the allegations in paragraphs 3, 4, 5, 6, 7, 8, 9, and 10.

2. In or about the year 1891 it was agreed between the plaintiff and the defendant that the defendant should make all necessary arrangements for the laying out of the farm Tintern, belonging to the plaintiff, as a township, and that the defendant should take steps to have the said farm surveyed and divided into erven. The said arrangements were thereafter made, and the said farm was thereafter so surveyed and divided. Defendant received no consideration for his said services.

3. It was further agreed that defendant should sell the said erven in terms of certain conditions of sale, a copy whereof is hereunto annexed, marked "A"; that defendant should receive from plaintiff a commission as remuneration for his said services; and that the plaintiff should pay the costs of survey and of advertising, the said costs to be recovered *pro rata* from the purchasers of erven.

4. Thereafter defendant paid the survey expenses on behalf of plaintiff, and debited the plaintiff with the amount thereof, but although 174 erven were offered for sale, many remained unsold, and a list of the same was supplied by the defendant to the plaintiff.

5. The defendant thereafter recovered from the purchasers of the said erven the *pro rata* share of survey and advertising expenses due from each and accounted to the plaintiff for the same; he has also accounted to the plaintiff for the purchase price of the erven sold according to the conditions of sale.

6. In July and in November, 1893, defendant rendered accounts to the plaintiff of the dealings between them, and showing the balance due by the plaintiff. The said accounts were true and correct and sufficient. In or about November, 1893, after examination of the said accounts, the plaintiff gave to defendant in full satisfaction and settlement of the amount due and owing by him, as shown upon the said accounts, a promissory note signed by him in defendant's favour for £342 12s. 0d., falling due on May 22, 1894.

7. Thereafter, at the request of the plaintiff, who was unable to pay the same upon the due date, the defendant accepted a renewal of the said note until August 21, 1894, and a promissory note for £351 2s. 0d., due on the above date, was thereupon signed by the plaintiff in defendant's favour.

8. The accounts above referred to showed the transactions between plaintiff and defendant, and were correct, and all vouchers and promissory notes were given back to plaintiff when the amount owing by him was settled as aforesaid.

9. Certain of the said 274 erven were sold to purchasers who were unable to pay according to the conditions of sale, whereupon, in or about November, 1893, the plaintiff agreed to take back the said erven.

10. The defendant submits that the plaintiff has acquiesced in and agreed to the settlement as above set forth, and that it is not competent for the plaintiff now to re-open the said accounts.

Wherefore he prays that plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant, now plaintiff in reconvention, says:

1. He craves leave to refer to the first paragraph of the plea.

2. In or about the year 1894, the plaintiff in reconvention performed certain work at the special instance and request of the defendant in reconvention, and disbursed certain moneys on his behalf, the particulars whereof appear in the account annexed hereto, marked "B."

3. In respect of the said services and disbursements the defendant is indebted to the plaintiff in the sum of £134 8s. 4d.

4. The said account has been rendered to the defendant, but he refuses to pay the same.

The plaintiff claims:

(*a*) The sum of £134 8s. 4d., with interest *a tempore moræ*;

(*b*) Alternative relief;

(*c*) Costs of suit.

The following was the plaintiff's replication and plea in reconvention:

1. The plaintiff says that save as hereinafter excepted and in so far as the defendant's plea admits any of the allegations in the declaration contained, he denies the said allegations therein contained and he specially denies that the defendant received no consideration for his services, that the plaintiff had to pay the costs of survey and of advertising, or that the defendant has accounted to the plaintiff for survey and advertising expenses and the price of the erven sold.

The plaintiff admits that in July and November the defendant rendered accounts, but says that they purport to be accounts of the same dealings, and differ from each other to the extent of £3,504 16s. 6d. He specially denies that he examined the accounts or that he gave the promissory note in full satisfaction and settlement. He specially denies that the defendant gave back all vouchers and promissory note, or that he acquiesced in and agreed to the alleged settlement and says that the said promissory note was paid by reason of it being in the hands of the third party.

Wherefore he again prays for judgment with costs.

For a plea to the claim in reconvention the plaintiff says:

1. He begs to refer this Honourable Court to the matters and things set forth in his pleadings in convention.

2. He denies that the defendant did any work for him in 1894 in respect of which any item for share of advertising Rhodes's erven is chargeable and says that this said item of £92 15s. 10d. is the item referred to in his declaration, and forms part of the matters and things complained of in the declaration.

3. He denies the other allegations in paragraphs 1, 2, 3, and 4 of the claim in reconvention, and begs to refer in answer thereto to the allegations in his pleadings in convention and says that the defendant is indebted to him in sums considerably in excess of the sum of £134 3s. 4d.

Wherefore he prays that the claim in reconvention may be dismissed with costs.

The rejoinder was general.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Graham), for the plaintiff.

Mr. Searle, Q.C. (with him Mr. McGregor), for the defendant.

For the plaintiff,

Jacobus Adriaan Vorster, plaintiff, a farmer at Lilyput, Barkly East, said he began to do business with defendant's firm in 1890. About 1891 he was the owner of the farm Tintern and he thought of selling it in erven for a township. He went to defendant's place and found Mr. Shaw, and arrangements were made by which defendant's firm were to do the work at 2½ per cent on the purchase price. Tenders from land surveyors were received for the measurement and sub-division of the land. His arrangement with defendant was that he had not to pay the expenses of survey for erven not sold; only if the village was not established he had to pay £50 to defendant. Eventually however he had to pay the whole cost of the survey, as the surveyor had summoned him and the contract having been lost in defendant's office he had to settle the case. The buyers of the erven had by his agreement to pay cost of advertising, &c. He was to pay £6 or £7 for the defendant's travelling expenses. He had expected the sale to be advertised in the local paper only, but it was advertised all over the Colony. The sale took place. He never received any cash payments for the plaintiffs for the land. He had been in the habit of getting cash for plaintiff and giving promissory notes for it, though that was when defendant had some of the payments for the erven in hand. He believed defendant charged discounts on the promissory notes but gave him no interest on the money in hand. In July, 1893, Arnold Orsmond, brother of the defendant, showed him an account with an amount of over £6,400 on the debit side and showing a credit to the defendant of £342 11s. 11d. He objected to the account and Arnold Orsmond said he would strike out many items which plaintiff considered came under the 2½ per cent. charge. In November he got another account and Arnold Orsmond read it out to him. This account was about £3,000 smaller than the other. Witness said he could not say whether it was right or not, but Arnold Orsmond said that he could take it home and if it was wrong they could make matters right afterwards. However he gave a promissory note for £342 12s. which was the amount of the debit against him. When he took the account home he could not understand it, and he took it later to Shaw, who was at defendant's office, and they compared the smaller account and the larger account with the books and found lots of mistakes. They then told him he was to get back £22 in expenses and another amount which was the purchase price of nineteen erven. In May, 1894, he went to Aliwal and saw the defendant, who referred him to Dudley Orsmond and said the promissory note might be renewed until August. Dudley Orsmond said that he must refer the matter to Arnold Orsmond. He got no account and in November ordered a solicitor to write stating that he would not be responsible for the promissory note until the disputed accounts were made straight. He was charged £15 as costs by defendant in an arbitration case with the Government which he had won.

Cross-examined: He had been a member of the Divisional Council and was a member of the Municipal Council. He had considerable transactions with Sauer & Orsmond. The second account he had seen was different from the large account by several items on each side of the account. He had had one promissory note renewed by the plaintiff without interest. He had found that the cost per erven for advertising was 11s. 6d. He might have received that amount in the case of a few erven which he had himself sold, but he did not think so. He had first paid some of the advertising accounts but had got this money returned though without interest. The whole amount received for the erven sold was, he was told, £1,493.

John Howard Cosnett, accountant, Cape Town, said the accounts had been submitted to him, and he had looked into them. The differ-

ence of £3,000 in the two accounts was due to taking out a great number of debits and credits, some of which were cross entries, and some of which he could find no connection between whatever. The accounts were very obscure. No interest was allowed to the plaintiff on the amounts received for the sale of erven, but on the promissory notes given by plaintiff interest was charged in some cases. In the various accounts there were three different items purporting to be the price received for the sale of the erven, £1,474, £1,513 and £1,493.

This closed the plaintiff's case.

For the defence was called:

Everitt George Orsmond, the defendant, carrying on business alone under the style of Sauer & Orsmond. He said he had a branch at Barkly East until May, 1894. Arnold, his brother, managed the place and Shaw was under him. Shaw was still at Barkly East. He had nothing personally to do with the transactions in the case. He had renewed a bill to the plaintiff for £342 12s. without interest, and when he refused afterwards to renew the bill the plaintiff disputed the account. The advertising expenses in connection with the sale were £156 16s. The amounts in the two accounts were taken out quite clearly. Interest was not paid to plaintiff on the purchase moneys of the erven, nor was interest charged on certain promissory notes of plaintiff's. Plaintiff had not been charged any advertising expenses.

Cross-examined: He would not mind the question of the interest being gone into by a qualified man except that it would be a costly matter. His brother Arnold had done everything in connection with the matter of plaintiff's.

Arnold Richard Orsmond, attorney, Stutterheim, said that he managed his brother's business at Barkly East until May, 1894. The long account put in was a complete extract from the ledger of the business between plaintiff and defendant. Afterwards he made up the "short account," and he could show exactly how the two balanced The plaintiff and he went through the "short account" and plaintiff expressed himself satisfied. He now found a small error of £2 7s. 6d., charged against plaintiff. When plaintiff had spoken to him about wanting interest on the purchase prices of the erven, he said that they had not charged him (plaintiff) interest on the promissory notes and then they decided to "cry quits" on witness renewing a promissory note for £342 free of interest for six months.

By the Court: Interest was charged on some of the promissory notes of plaintiff, the interest being added on to the principal and the note taken for the two combined. When he lent money on promissory notes, he did not always look in the books and see if he had money of plaintiff's in hand.

Cross-examination continued: The amount of £15 15s. which the plaintiff objected to in the account was a charge between client and attorney. Plaintiff had asked them what they would charge him to try and get compensation from Government for taking a road through his farm and they said £15 15s. He considered that a proper charge to make, whatever they might recover in the way of costs from the Government. He believed that at the day of sale the charge of 6 per cent. mentioned in the conditions, interest on unpaid purchase sums, was waived.

Samuel Edward Shaw, Barkly East, said he was until June, 1894, employed by the defendant. He had been the auctioneer who sold the erven at Tintern. In November, 1893, he knew that Arnold Orsmond and the plaintiff had a long discussion of the various items of the bill. Interest on the purchase prices of the erven, it was announced at the sale, would not be charged.

Cross-examined: The arbitration case had been decided and costs amounting to £27 recovered by the defendant. That £27 included the costs of three parties, one of which was the plaintiff. He, himself, could not understand the account rendered by defendant to plaintiff. Kannemeyer the surveyor was paid £195 by defendant on behalf of plaintiff, and plaintiff was debited with £200 by defendant.

Arnold Orsmond was recalled to explain the charge *re* Kannemeyer, and said that plaintiff owed to Kannemeyer £200 and they had a private arrangement with Kannemeyer by which they took a percentage, Kannemeyer only receiving really £180 8s.

Postea (June 2nd).

For the defence: (continued).

Everitt Orsmond, the defendant, put in an interest account which showed that on the promissory notes given by plaintiff the interest was £197 9s. 5d., whilst the interest on money he held of plaintiff's amounted to £169 11s. 7d., leaving a balance of £27 17s. 10d. That was calculated at a uniform rate of 8 per cent. on debits and credits. There was an error of £5 in the account of Kannemeyer. He should have only charged plaintiff £195. The difference between the £195 charged to plaintiff and the money he paid to Kannemeyer was the usual commission of 5 per cent. which surveyors pay to attorneys. He had done nothing for the commission, but it was a usual allowance.

Mr. Cosnett said he had looked through the interest account, and some items had been explained. As showing the obscurity of the accoun', he found that one item of £210 in the short account was made up of two or three promissory notes and loans. He considered that plaintiff had been over-charged £29 3s. 9d. on the interest account in connection with Kannemeyer's charge; whilst if the £1,462 purchase price was allowed to bear interest from the time it was entered in the books of the defendant, it would make a difference of £50 in favour of the plaintiff.

Mr. Innes said that he had got vouchers from the Audit Office to show that the defendant had received £48 taxed costs from the Government in connection with the three arbitration cases, of which plaintiff's was one.

Mr. Innes in argument stated: We asked that these complicated accounts should be submitted to arbitration which the defendant never accepted. The accounts as rendered to us gave us no idea of what was disputed.

The Chief Justice: Yes, but did not defendant take up the fair attitude—Before we arbitrate tell us the basis of arbitration?

Mr. Innes: But Vorster without Orsmond's book could not understand the account It is only at the last moment that we have had an opportunity of inspecting the books.

The Chief Justice: What your client should have done was—refuse to accept the account. Yet he signs the promissory note The only objection he raised before that was as to the interest.

Mr. Innes: The signing of the promissory note raises only a *prima facie* presumption—though strong—that the money is due. It is like a receipt, and can be gone behind. This is so under the common law, and the point is strengthened by the special agreement that certain items should be gone into thereafter.

As to the £10 bonus from Kannemeyer the defendant says that it is common practice for attorneys to arrange with surveyors to receive such commissions—but this is most improper, the attorney is acting for his client and latter is entitled to such commission.

Mr. Searle: In April of present year we offered full inspection of the books. The defendant wrote the letter asking what items were objected to. The plaintiff did not reply and the defendant was perfectly justified in his action thereafter.

The Chief Justice said: It is impossible in this case to approve altogether of the manner in which the accounts were in the first instance rendered by the defendant. The first account rendered to the plaintiff was extremely obscure, so much so that defendant's own witness Shaw said he could make neither head nor tail of it. Mr. Arnold Orsmond, the defendant's brother, practically admitted the obscurity of the account, because when pressed by plaintiff he rendered another account—what is called the second account. It appears to me that the second account was fully debated and discussed between plaintiff and Arnold Orsmond, and objections were taken by the plaintiff and reductions made on that account. At that time there was found a promissory note still due of £178, and that item, together with the balance in the account, were added together, and a promissory note for £243 was passed by the plaintiff in favour of the defendant. Now *prima facie* the giving of this promissory note would import a settlement of all accounts as between plaintiff and defendant. I am inclined to accept the statement made by Arnold Orsmond that at the time the question of interest was raised an objection was raised by the plaintiff that he was charged with interest upon his promissory notes and not credited with interest upon the payments made to the defendant, and that then it was stated that they would pretty well balance each other, and upon this statement the plaintiff agreed to sign this promissory note. Now in connection with this same objection, that was raised at that time, on the question of interest, if it had been shown now in debating the accounts that there was a substantial difference, the Court would have ordered a full reopening of these accounts and ordered an accountant to go fully into the whole matter, in order to ascertain exactly the balance due by either party. But I think this is unnecessary now, because on going into this question of interest we find the two items do pretty well balance each other, and we have almost performed all the duties which an accountant specially appointed for the purpose could have performed. We have now before us all the materials for arriving at a satisfactory decision. As regards interest, it does not appear that a substantial mistake was made. There is a mistake in the account of £5, in that the plaintiff was debited with £200 instead of £195. Then in regard to the 10 per cent. commission, I quite agree with Mr. Innes that that 10 per cent. commission plaintiff should get the benefit of. There may be a few minor items which might have to be credited to plaintiff; but taking the accounts as a whole, it appears to me that there is no proof that the plaintiff has been unfairly dealt with. The charges were correctly made, and were all charges which the plaintiff ought to pay; that is, except the

items referred to. With regard to the claim in reconvention. Mr. Searle does not desire to press it. The fifteen guineas arbitration fees ought not to have been charged. There is no clear proof of a special arrangement for fifteen guineas to be paid no matter how the case resulted, and in a case of this kind the attorney should only charge his client such charges as are allowed in an ordinary bill of costs. The judgment of the Court will be: Judgment for the defendant in convention as well as judgment for the defendant in reconvention. Then as to the question of costs. The whole of the costs were incurred in this case in consequence of plaintiff insisting upon having this original account altered. He has not succeeded in obtaining any substantial alteration in the amount. It is true he offered, through his attorney, to go to arbitration, to which defendant in my opinion gave the very proper answer, "I should be prepared to go to arbitration if you make a statement as to the exact objections which you have to my account." It must be borne in mind that the plaintiff was assisted by a legal adviser who had these accounts before him, and should have been in a position to state exactly what the exact objections were. It would have been only fair then to have stated what the objections were, and asked the defendant to show his books and compare and see how far those objections should be removed or substantiated. Instead of that plaintiff insisted on going to law, and considerable costs must have been incurred by reason of the removal to this Court. Plaintiff, I am afraid, is responsible for this. At first my sympathies were with him, seeing that he was dealing with an attorney who was bound to furnish a full account and deal in a proper manner towards his client. But I confess, after hearing all the evidence given in this case, the plaintiff appears to me to be at fault in proceeding to law before endeavouring to satisfy himself, through the books and such other explanations as could have been given, as to whether the objections were well founded. Plaintiff, therefore, must pay the costs in this action.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

ILLIQUID ROLL.

VAN DEN HEEVER V. KRUGER AND ANOTHER. | 1896. May 30th.

Mr. Smuts applied for a judgment in terms of Rule 329. There were claims against the defendants for £9 14s. 6d. and £12 9s. 3d. for legal services rendered.

Granted.

MOTIONS.

ADMISSIONS.

On the motion of Mr. Close, Frederick Jacob Mellish was admitted as attorney and notary.

On the motion of Mr. Molteno, Douglas Alvanley Arderne was admitted as an attorney, notary, and conveyancer.

WILLIAMSON V. WILLIAMSON.

This was an action for judicial separation brought by the wife against the husband. The parties were married in Scotland on November 22, 1867. There were nine children of the marriage, five of whom were minors. The declaration stated that defendant had cruelly ill-used the plaintiff. It was stated that the defendant had gone to Johannesburg.

Mr. Buchanan appeared for the plaintiff.

Barbara Williamson, the plaintiff, said she came to the Colony in March 1895. When there was no drink she lived happily with her husband. Her husband was intemperate, and when in drink he was violent. In August, 1895, her husband came home drunk. He wanted more money, which witness refused. She afterwards had to leave the house on account of defendant's violence. She took her children with her. On the following Christmas Day the defendant struck witness in the face, took hold of her by the throat, and dragged her through the house. Witness was much hurt, and her clothes were torn. Witness kept a boarding-house, and made all payments in connection with it. On March 9 last defendant came to the house, and threatened to turn witness out. He afterwards took hold of her by the back of the neck, and threw her across the room, hurting her very much. Witness afterwards went to her son's house. Next

day she returned to her own house, when the defendant told her to go away. She subsequently entered, but was put out by defendant together with her children. In a scuffle which afterwards occurred defendant was arrested, and bound over to keep the peace. The furniture was afterwards sold in execution for a debt owing by the defendant. Defendant had never contributed towards keeping the house. Defendant had gone to Johannesburg.

William Bowie, a compositor, said he boarded at the house of the defendant in Shortmarket-street. Witness proved acts of violence committed by the defendant upon the plaintiff. Defendant once had hold of his wife by the throat, and choked her until she was black in the face.

A decree of judicial separation was granted with costs; plaintiff to have the custody of the minor children, and to be free from liability for the debts of her husband.

[Plaintiff's Attorney, Gus. Trollip.]

SMITH V. SMITH.

This was an action brought by the husband for restitution of conjugal rights. The parties were married on November 23, 1886. Defendant deserted the plaintiff in April, 1894, but came back in March last. She again deserted him on April 24, 1896.

Mr. Jones appeared for the plaintiff.

William Smith, the plaintiff, said he was mate on the steamer Enterprise. He and his wife first quarrelled in 1893. Defendant insisted upon keeping boarders, and witness objected. They quarrelled, and witness gave the boarders notice to leave the house. Defendant then said if they left she would leave, and she did so, taking the two children with her. She stayed away two years. She came back on March 21 last, but again deserted him on April 24.

Norman Lacy, of the Colonial Office, produced the official record of the marriage.

The Court granted a decree for restitution of conjugal rights, defendant to return on or before July 15, failing which a rule *nisi* would be granted calling on defendant to show cause, on 1st August, why a decree of divorce should not be granted.

[Plaintiff's Attorney, W. E. Moore.]

REHABILITATION.

Mr. Tredgold applied for the rehabilitation of Hermann Teich.

Mr. Watermeyer, on behalf of creditors Messrs. Lieberman, Belstedt & Co., who hold a bond of £1,500 on the estate, opposed the application.

The Chief Justice said that notice should have been given in the "Gazette" of the section of the Act under which the application was to be made. The Court would make no order until the proper notice had been given in the "Gazette." Applicant to pay the costs of this application.

GENERAL MOTIONS.

COLONIAL GOVERNMENT V. TOBIYA.

Mr. Sheil applied for leave to sue by edictal citation in an action against the respondent for specific performance of certain contract by which he became purchaser of a piece of land marked No. 6, in the district of Matatiele, or otherwise for cancellation of the said sale and forfeiture of the part purchase price already paid.

The Court granted the application; publication to be made of the rule in "Imvo" and the "Government Gazette."

THE PETITION OF THE SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY.

Mr. Tredgold applied for authority to the Registrar of Deeds to issue a certified copy of certain mortgage bond passed in favour of petitioners by Thomas Ignatius van Niekerk and others, hypothecating certain farm called Stilgenoegen (original bond having been destroyed or mislaid).

Granted.

IN THE ESTATE OF THE LATE BERNARD ABRAHAM.

Mr. Buchanan applied for authority to the Registrar of Deeds to cancel certain mortgage bond passed by the said Abraham for £50 in favour of Michiel Pentz, hypothecating a piece of ground in the Newlands Avenue, it being alleged that the bond was paid off in or about the year 1863; but the proof thereof cannot be obtained on account of the death of the said Pentz and the winding-up of the South African Bank, to which the bond was pledged.

Granted.

IN THE MATTER OF THE MINOR LOXTON.

Mr. Tredgold applied for authority to the Master of the Supreme Court to pay out to the tutors dative of the said minor from money to his credit in the Guardians' Fund a sum expended by them on account of the minor, and a further annual allowance while under apprenticeship to a wagon-builder, and until he attains his majority.

Granted.

IN THE MATTER OF MINOR BOURHILL.

Mr. Searle, Q.C., applied for authority to the Master of the Supreme Court to pay out to the tutor dative of the said minor from money to her credit in the Guardians' Fund an annual allowance to enable her to be educated with a view to earning her living in the future.

Granted.

IN THE MATTER OF THE MINOR SMALBERGER.

Mr. Molteno applied for authority to the mother of the said minor to accept the bequest to him of a share in the farm Zandfontein, in the district of Riversdale, and to join in passing a mortgage bond over his portion for the purpose of discharging the present mortgage and defraying all costs in connection with the acquirement of the property.

Granted.

IN THE MATTER OF THE MINORS VENN.

Mr. Molteno applied for authority to the Master of the Supreme Court to pay to the mother of the said minors out of money to their credit in the Guardians' Fund sufficient to enable her to discharge liabilities incurred for their maintenance and education, she being in poor circumstances and unable to support them.

Granted.

IN THE MATTER OF THE MINORS VAN VUUREN.

Mr. Tredgold applied for authority to the executor of the estate of the minors' parents to effect transfer to the said minors of certain agreed portions of the farms Matjesfontein, Muggefontein, Leingersfontein, Roodeheuvel, Stingfontein, Hoedemaker, and Middelfontein, and to arrange for the payment to certain of them of sums of money awarded by reason of the different extents of land to be transferred.

Granted. Order made in terms of the Master's report.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

WESSELS v. WESSELS. { 1896. June 1st.

This was an action for judicial separation brought by the wife against the husband. It appears that the parties were married in the year 1855 in community of property. There were eight children of the marriage, one of whom, a boy, was a minor. Defendant had refused to supply plaintiff with the necessaries of life, and had treated her cruelly. Plaintiff claimed a decree of judicial separation, the appointment of a receiver, and the custody of the minor child.

The plea admitted the marriage, but denied the ill-treatment, alleging extravagance and want of attention to domestic duties.

Mr. J. Rose-Innes, Q.C., with whom was Mr. Tredgold, for the plaintiff. Mr. Sheil, with whom was Mr. Benjamin, for the defendant.

Caroline Francina Wessels, the plaintiff, said she was married in 1855. There were eight children, one of whom was a minor seventeen years of age. The brother of this child paid for his schooling. Their married life had not been a happy one. Her husband had a fearful temper, and a domineering spirit. They had lived in Joostenburg, and there they lived most unhappily. They had not spoken to each other for four years. Since 1883 defendant had paid nothing towards her support or that of her daughter. Her sons had supported her, and she had had great difficulty in making both ends meet. Plaintiff's sister used to give witness clothes. Defendant had treated her very harshly and unkindly, had used bad language to her, and had shown her no consideration whatever. She objected to a man named Dreyer coming on the farm as he was addicted to drink. She also objected to a Mr. Joubert's presence. Defendant told her she would have to go away rather than Dreyer. Neither plaintiff nor her children were allowed butter, although there was plenty upon the farm. Defendant had also refused to allow her the use of a cart to go to church, although there were two carts on the farm. Defendant had used bad language in the presence of the children and also of the governess.

Cross-examined by Mr. Sheil: Witness had been married to the defendant forty-one years. She brought nothing into the community of property. For five or six years after the marriage defendant's sisters had done work upon the farm.

Witness herself did what was necessary as a farmer's wife. There were always differences, but they had become more serious during the last ten years. For six years her daughter Minnie had not spoken to her father because she was afraid of him. Defendant never actually struck witness, though he had threatened her. She attended to the house work, and served out the rations for the men. Defendant had had heavy losses, but she was not aware they amounted to £18,000. She had never heard her daughters use disparaging language to their father. Her daughter Minnie had never called him an old fool, nor had witness used such language. When defendant was ill five years ago witness looked after him. Subsequently, however, defendant had been again ill, when witness did not attend to him. She had never refused to give her husband food. Defendant had never sent money to her by her daughter Margaret. Witness always looked after defendant's clothing. It was not true that if he wanted eggs or fowls he had to buy them from witness. She had never defied her husband. She remembered a Hebrew pedlar coming to the farm some time ago, who played a barrel-organ. Defendant objected to the servants listening to the music. Witness afterwards took the organ-player into the school, where he continued the music in the presence of some of the servants. She remembered two men coming to the place to clean out a dam. They were supplied with food. For some time past witness had not sat down to meals with her husband. The latter had never approached her with a view to settling their difference. Witness had refused an offer of £10 a month, as she could not live upon that amount. Her son the attorney was not at the bottom of this case. Defendant had had to sue their sons for money owing. Two of the sons were attorneys, and one was a land surveyor. Witness did not dislike farming life, but it had been made so unhappy for her.

Re-examined: Witness had not managed the dairy for the last four years, as defendant was suspicious of her taking butter for her own use.

By the Court: Defendant had been harsh to her during the whole of the forty-one years. There may have been a little kindness Defendant was a sober man. Witness had lost all regard for him long ago. She could not live with her two daughters under £20 a month. Both daughters were of age and unmarried. She would like £25 a month.

Henry Petrus Wessels said he was a son of the parties, and was twenty-two years of age. He was living at Vryburg, and went there in January of last year. When he was at home his father and mother were not on speaking terms. His mother was never allowed any money for clothes. She had to buy clothes out of poultry money, which was very scanty, and was assisted by the sons. It was a common thing for his father to use bad language; he had an ungovernable temper. His father had told him to watch the fruit and vegetables, so that his mother should not get them.

Cross-examined: Witness's father sent him to school up to a certain time. His brother paid the schooling one year. He was not aware of any particular losses his father had had. Witness had never heard his mother use strong language to the defendant. He lived with the defendant up to January, 1895. His father was slightly deaf, but he had never heard his mother ridicule this infirmity. His mother sent eggs into Cape Town to market three times a week. Defendant used to look away certain provisions from the plaintiff and the children. There was plenty of food to eat in the house. He had often seen his mother and sisters in want of clothing, so that they could not go to church on Sundays.

Daniel Henry Willem Wessels, another son, an attorney practising at Vryburg, said that he had never persuaded his mother to go into court; he had always been averse to this. Witness left home in 1885. In his time things were quite bad enough. He did not think many women would stand what she had stood.

Cross-examined: His father had seen that he was educated. He denied absolutely that his father gave him £200. He had a family himself, but he would assist his mother. His father sued him on a promissory note when he was laid up with illness. Witness signed the promissory note because his father said the sons should pay something back on account of their schooling. When he came down to Cape Town some time ago he came to talk to Mr. Hofmeyr upon some political business. He did not come down in connection with the case. He absolutely denied having urged his mother to bring the present action.

Jacobus Christoffel Wessels said he was thirty years of age, a son of the parties. Witness was unmarried and now lived in Bechuanaland. He left home in 1887. When he left home there was unpleasantness between his mother and father. His father was a man of most violent temper. Witness was on the farm for a week last Christmas, when he found a great estrangement. The parties did not speak to each other. The position of his mother was not tolerable. Neither his mother nor sisters spoke to his father. On

Christmas Day defendant kept them at home, though he did not use the cart himself. He wanted to go to the Paarl. He had nothing to do with the commencement of these proceedings.

Cross-examined: Witness did not think his father's offer of £10 a month sufficient. His father had sacrificed the farm when he sold it for £4,000. He had paid defendant money under letter of demand. Last Christmas Day the defendant dined at the table with his mother and sisters.

Re-examined: He was still willing to assist his mother.

John Robb, cashier in the South African Mutual Life Office, said that defendant's life was insured for £2,100. The policies were surrendered to the office last month. He drew £1,220. During the last ten years he received advances, and he received the balance of £720 last month.

Cross-examined: The money was paid to defendant himself.

Margaret Gertrude Wessels, a daughter of the parties, said that defendant and plaintiff lived very unhappily. This was her father's fault because of his bad temper. Defendant had used insulting language to her mother and sisters almost daily.

Cross-examined: Witness's mother was angry when Mr. Dreyer was brought into the house. Had never heard her sisters call her father any names; she had heard him called an old fool. The entire fault was on her father's side. Her father had never given her £5 to take to her mother. The family had often been in want of clothes.

Maria Wessels, another daughter of the parties, gave corroborative evidence.

By the Court: Witness was now living with her mother and sister in Cape Town. They left the farm a fortnight ago. The sale at the farm included the sale of the stock. Defendant was paying nothing towards their support.

This closed the plaintiff's case.

For the defence,

Daniel Andries Willem Wessels, the defendant, said he was seventy-four years of age. There were eight children of the marriage, one of whom was dead. The marriage took place in 1855. During the first sixteen years witness's two sisters looked after the farm. One married and one died, after which his wife took up the management. He gave up the first farm because his wife was deficient in managing the domestic affairs, and would not be guided. During the last few years he had lost £15,000. There was a black conspiracy against him. His children had never appreciated the fortune he had spent upon their education. He had never used bad language to his wife, though he had spoken sharply to her. His wife had not properly attended to her domestic duties. He had complained as to the way his daughters were being brought up; that his wife did not teach them to cook. His wife was exceedingly passionate, especially against witness. There was a gold-mine on the farm for a woman. There were 400 poultry on the farm and still he had to buy eggs for himself. He had always provided proper supplies. When his wife was without butter so was witness. When he was ill Mr. Dreyer and another man attended upon him. His wife did not. He had offered his wife £10 a month. He had asked her to make up the quarrel. His wife took offence at Dreyer, who was as good as three boys. His wife blackguarded him; and witness recommended the man to bring the plaintiff before a Magistrate for defamation of character. Witness had never seen Dreyer drunk. Witness remembered the visit of the Jew pedlar with the barrel organ. Witness ordered the man away as the servants were idling. His wife took the pedlar inside and made witness a laughing-stock. Witness was in possession altogether of £4,700.

By the Court: The sale price, £4,000, included movables. Witness was living at Somerset West. He did not know where he should live permanently. He was quite invalided.

Cross-examined by Mr. Innes: Witness had sold 130 leaguers of wine for £600. Witness got about £800 for the wine and brandy. Witness was not willing that the estate should be equally divided. Witness was willing to pay his wife £10 a month or £1,500 down. His temper was not a bad one. He found his children in a group with the mother in the centre in a conspiracy against him. On Christmas Day that "woman" after she and her children had partaken of dinner snatched half a goose off the table, and left witness only some cold salt pork for his dinner.

Re-examined: The full value of the joint estate was £4,700. When he wrote the letter saying he would not pay the debts of his wife it was only written to check their extravagance.

By the Court: Witness could not give £1,750. He would pay £1,600.

The Chief Justice: I suggest that you pay £1,750, and settle the thing amicably.

Witness: My lord, have mercy upon me. £1,600.

Mr. Sheil: My lord, could you allow me to have a consultation with the defendant for a few moments?

The Chief Justice: Yes.

At this stage Mr. Sheil retired with the defendant. On returning,

Mr. Sheil stated the defendant was willing to pay £1,750.

The Chief Justice: I think she might have humoured his infirmities a little. I think that's to be considered in settling the amount. We have not heard the other side, and there were evidently faults on both sides.

Mr. Innes then retired for the purpose of consulting with the plaintiff.

On his return Mr. Innes stated that plaintiff would accept £1,750 if defendant would pay the costs. The sons would have to make up £300 a year.

The Chief Justice: I think the parties ought to agree upon a settlement of £1,750, each party to pay their own costs. Otherwise we shall have to hear further evidence.

Mr. Innes said if the Court would make the order for £1,750, he would advise his client to accept it.

The Court made an order in the following terms: The sum of £1,750 to be paid to plaintiff by the defendant within fourteen days; decree of judicial separation; plaintiff to have the custody of the minor child, defendant to be allowed access to him at reasonable times.

[Plaintiff's Attorney, Gus. Trollip; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SMITH V. SMITH. { 1896. June 1st.

This was an action for restitution of conjugal rights brought by the wife, Isabel Smith, against her husband, Frederick Smith. The parties were married in London in 1875, and came to Cradock in 1877. There were three children.

Mr. Close for the plaintiff.

Isabel Smith, the plaintiff, said she was married at Trinity Church, Stepney, in London in 1875. They came out to the Colony in 1877. There were three children. They lived in Cradock a little over four years. Her husband left her in 1882. Since then her husband had not contributed to her support. Defendant was a builder. He went to Port Elizabeth in 1882, and had not written to her since. She had heard that the defendant was not of sober habits.

The Court granted a decree in the terms applied for, returnable August 15, failing which to show cause by August 31 why a decree of divorce should not be granted. Service of the rule to be same as that of the intendit.

[Plaintiff's Attorney, Gus. Trollip.]

MOLONY V. CONRADIE'S EXECUTOR. { 1896. June 1st.

Resident Magistrate—Costs—Judicial discretion.

M., *a doctor, sued on a summons on an account for £19 sent to an executor testamentary for attendance on the testator, the items of which were not specified.*

When action was brought the case was postponed to allow M. *to submit a specified account, which he did, but this account was erroneous, and had to be amended. The Resident Magistrate gave judgment for the correct amount (£12 10s.) but ordered plaintiff to pay costs by reason of the faulty summons and account.*

Held on appeal *that the Resident Magistrate's discretion as to costs being a judicial one, and it having been judicially exercised, the judgment should not be altered.*

This was an appeal from the decision of the Resident Magistrate at Beaufort West; the amount in dispute being on an account rendered for medical attendance upon the late Catharina C. Conradie, account rendered. The case was heard before the Resident Magistrate at Beaufort West, who gave a judgment for £12 10s., costs to be paid by plaintiff owing to the faulty state of summons and account. The claim was for £19.

Mr. Graham for the appellant Molony (plaintiff in the Court below); Mr. Searle, Q.C., for respondent (defendant in Court below).

The point of appeal was the order to pay costs.

Before the Resident Magistrate:

Mr. De Smidt, for defendant, excepted to the summons on the ground that it disclosed no sufficient cause of action, inasmuch as the services and attendances are not specified, or sufficiently stated or shown to enable the defendant to plead or answer the claim.

Defendant as a further exception stated that he received no demand except a note annexed from plaintiff now put in, dated 3rd April, 1896, at Beaufort West, posted on same day that summons was issued, viz. on 4th inst., which demand does not correspond with the account annexed to the summons, and defendant prays that the case may be dismissed with costs.

With regard to the first exception the plaintiff calls Mr. Whiley to prove that on two different occasions accounts were handed to Attorney De Smidt as representing the execu-

tor. These were not specified accounts, but Mr. De Smidt accepted them and did not ask for a specified account.

The following were the Resident Magistrate's reasons:

In this case the defendant was summoned in his capacity as executor dative to the estate of the late Catharina Cornelia Conradie, widow of Petrus Jacobus Conradie, for the sum of £19 alleged to be due to plaintiff for professional services rendered and attendance upon the said late Catherina Cornelia Conradie from 1st January, 1894, to 18th July, 1894. The account annexed to the summons is not a specified one.

When called upon to plead the attorney for defendant excepted to the summons on the ground that it discloses no sufficient cause of action inasmuch as the services and attendances are not specified, or sufficiently stated or shown to enable the defendant to plead to or to answer the claim. The defendant as a further exception states that he received no demand except a note dated 3rd April, 1896, from plaintiff posted at Beaufort West on same day that summons was issued, viz., on the 4th April, 1896, which demand does not correspond with the account annexed to the summons, and defendant prays that case may be dismissed with costs.

Some evidence was taken, but owing to plaintiff not being able to satisfy the Court as to the items composing the sum claimed the further hearing of the case was postponed from 9th April, 1896, to the 27th April, 1896, and the plaintiff was ordered in the interim to hand defendant's attorney a duly specified account

When case was called on 27th April, 1896, the defendants' attorney stated that plaintiff had handed to him a specified account on the 21st April last. This account was handed in. In said account it was satisfactorily proved there was a clerical error *re* a visit on 18th July, 1894, on the deceased (Mrs. C. C. Conradie), who had died the previous day. The charge of 5s. for said visit was therefore erroneous.

The said specified account further disclosed the fact that there were certain charges in it for visits, &c., *re* one Miss Conradie, who turned out to be one Mrs. H. F. Conradie, and had been married as far back as 28th August, 1893, as follows:

21 visits at 5s. ...	...	£5	5	0
8 medicines at 2s. 6d.	...	1	0	0
		£6	5	0

This sum (£6 5s.) plus the erroneous charge on the 18th July, 1894 (5s.), together £6 10s. the Court ruled could not be allowed as against the estate. Wherefore the claim was reduced to £12 10s., for which sum judgment was given.

As regards the charges for visits, &c. (£6 5s.), on Mrs H. F. Conradie, who was not the only heir, and who was a major, the Court held that they should not have appeared in the account. And further, that even if it were held that the said charges are legally chargeable to the estate then the summons does not, as it certainly should, aver in the same, and in fact makes no mention whatever in the plaint of the said Mrs. H. F. Conradie.

The defendant's attorney it will be seen never withdrew his exceptions, and the Court, which is one of equity as well as of justice, held that owing to the faulty state of the summons and the account, which when first rendered was not a specified one, exception No. 1 was fatal, and therefore ordered the plaintiff to pay all costs.

Mr. Graham: It is admitted that De Smidt was the agent of the respondents in 1895. He could have got specified accounts—he did get an account. As to Resident Magistrate's judicial discretion as to costs, see *Kirsten* v. *Van Noorden* (Buchanan 1879, 2, 32.)

Mr. Searle referred to **Fraustaedter* v. *Sauer and Another* (2 Sheil, 396). Amost serious burden would be cast on executors if they had to pay (without specified account) claims for medicines supplied to deceased. The Resident Magistrate arrived at an equitable decision in making appellant pay costs: *Marks* v. *Esthuizen* (3 Juta, 38).

The Chief Justice said: The question of costs must always be in the discretion—a judicial discretion—of the Court which has to decide the case, and this Court cannot interfere with the exercise of that discretion unless it is clear the Magistrate has exercised no discretion at all, or has proceeded on erroneous grounds. The Magistrate decided that the plaintiff was to pay the costs, and the question is is that such an abuse of his judicial discretion as to entitle the Court to uphold the appeal. But the Magistrate gives his reasons, and I think there is considerable weight in these reasons. The plaintiff sends in an account to an executor dative. It is clearly the duty of the executor dative closely to scrutinise such account, and he is entitled to claim a specified account from the doctor. It is the duty of the doctor also when he claims money from an estate to send in a specified account showing exactly in what manner his account is made up. No specified account was sent in, but a summons is issued for £19 for attendance, not upon anyone else but upon the deceased person. The case is postponed, and exception is duly taken that there ought to be a specified account. The case was postponed so

* 9 Juta, 411.

that Dr. Molony might frame a specified account. He frames one, but that is erroneous, because he claims money from the estate which he knows he ought not to claim. He is only entitled to claim against the estate for attendance upon the deceased, or for attendance for which the deceased has promised to pay. There was no evidence that he was entitled to claim against the estate of the deceased for attendance upon a married daughter of the deceased. If he had in the first instance framed a specified account showing all attendances on the deceased person, the executor dative might have paid it without any costs being incurred. Under these circumstances, I am not inclined to interfere with the decision of the Magistrate as to the costs. The appeal must therefore be dismissed with costs.

Mr. Justice Buchanan concurred. He did not think there was any ground for interfering with the Magistrate's decision.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

In re RUSSO. { 1896. June 1st.

Will — Construction — *Fidei-commissum* — Issue—Illegitimate children.

By the law of this colony the general rule that "the mother makes no bastard," *so far as intestate succession to her property is concerned, applies also to the succession of illegitimate children to their maternal relatives.*

Where, however, a fidei-commissum *is imposed by a father's will upon the inheritance of his daughter in favour of her issue, only her legitimate issue are entitled to share as fidei-commissaries unless the will contains clear indications of an intention to the contrary.*

This was an application by Johan Simon Adolph Repetzky and Johanna Maria Jacoba Greeff (born Repetzky) upon notice of motion to W. A Currey, as representing the General Estate and Orphan Chamber, and Augusta Russo (born Beautien) in their capacity as executors testamentary of the estate of the late Johan Simon Adolph Russo.

Mr. Tredgold for applicants.

Mr. Searle, Q.C., for respondents.

The notice of motion called upon the respondents to show cause, if any, why they should not be ordered:

To alter and amend a certain distribution account framed by them of the fidei-commissary inheritance of the late Johanna Gertruida Repetzky (born Russo), devolving out of the estate of the said Johan Simon Adolph Russo by expunging the awards therein made to certain issue of the said late Johanna Gertruida Repetzky, named: William Herman Bedser, Edward Bedser, Percy Riley Bedser, and Herman Arthur Benjamin Bedser, on the grounds of the illegitimacy of the said issue and their being by reason thereof not entitled to inherit the respective sums so awarded to them.

To award the said respective amounts in equal shares to the applicants and to Francina Gertruida Repetzky, a minor, as the legitimate and lawful issue of the said Johanna Gertruida Repetzky, and as such the persons entitled, in terms of the testamentary dispositions of the said late Johan Simon Adolph Russo, to the benefit of the share of the inheritance devolving out of his estate.

To pay the costs of this application.

The following was the material clause of the will of the original testator, Johan S. A. Russo:

"I hereby entail the residue of my estate with the burden of *fidei-commissum* and do will and direct that the net interest and income thereof shall go to and devolve upon my children named: Johanna Gertruida Repetzky (born Russo), John Simon Russo, Dorothea Maria Jacoba McCarthy (born Russo), Caroline Johannah Hyland (born Russo), Catherine Henrietta Webster (born Russo), and Herman August George Russo, share and share alike, and upon the death of one or more of my said children *leaving issue* the share of such child or children in the said residue of my estate shall go to and devolve upon such issue free and unencumbered, but in case such child or children shall die without leaving issue, then the interest falling to such child or children shall go to my surviving children."

The applicants filed affidavits setting forth that they were the lawful issue of Johanna Repetzky (born Russo).

Mr. William Arthur Currey, the respondent, filed the following affidavit:

That I am the secretary of the General Estate and Orphan Chamber, and as such act for the said Chamber, who together with Augusta Russo were appointed the executors testamentary of the estate of the late Johan Simon Adolph Russo.

That I am in my capacity as aforesaid the administering executor of the said estate.

That I framed a distribution account of the fidei-commissary inheritance of the late Johanna Gertruida Repetzky (born Russo), devolving out

of the estate of the said late Johan Simon Adolph Russo, and awarded the amount for distribution to the applicants, Francina Regina Gertruida Repetzky, and the four children the issue of the said Johanna Gertruida Repetzky (born Russo), by one William Henry Bedser, to whom she was never married.

That in drawing up the said distribution account, I was guided by the wording of the last will and testament of the said late Johan Simon Adolph Russo, bearing date the 24th September, 1887, which provided that upon the death of one or more of his children, leaving issue, the share of such child or children shall go to and devolve upon such issue.

That I am informed (which information I believe to be true) that the ages of the said children by William Henry Bedser are respectively thirteen, seven, five and three years.

William Henry Bedser made affidavit that he had cohabited for seventeen years with the late Johanna Repetzky, and that the four children named Bedser referred to in the notice of motion were then procreated without lawful marriage having been entered into.

Mr. Tredgold urged that "issue" in our law by itself means lawful issue: *Voet* (36, 1, 13); *Van Leeuwen* (Kotzé's Trans., p. 48); *Grotius' Opinions* (De Bruyn's Trans. p. 210). In English law it also means this: *Jarman on Wills* (p. 1076). Unless testator specifically admits them there is no rule of our law allowing illegitimate children to come in under the word "children" even if testator knew of their existence, which he did not in this case.

Mr. Searle argued that it must be shown that at the time of the will there are legitimate children who will exclude the illegitimate. *Voet* (36, 1, 13) and *Schorer's Note* (141); *Censura For.* (Foord's Trans., p. 6); *Bynkershoek Quaest Priv. Jur.* (Bk. 3, 11). As in intestacy "the mother makes no bastard," so if testator says "my daughter and her children are to succeed," all children would be lawful in respect to her and would succeed through her.

The Chief Justice said: The testator by his will entailed the residue of his estate with the burden of *fidei-commissum* and directed that the income should devolve on his children, and that upon the death of one or more of them leaving issue the share of such child should devolve on such issue free and unincumbered, but that "in case such child or children shall die without leaving issue then the interest falling to such child or children shall go to my surviving children." Among the testator's children who survived him was his daughter Johanna. She married Repetzky, by whom she had three children. After his death she had four illegitimate children by one Bedser. Upon her death the administrators of the testator's estate awarded to the four illegitimate children of Johanna, a proportionate share of the fidei-commissary inheritance. The three legitimate children object to this award and the question to be determined is whether, according to the true construction of the will, the illegitimate children should be regarded as issue, together with the legitimate children of the testator's daughter Johanna. If a son instead of a daughter had left illegitimate children there can be no doubt that they would not be regarded in law as his issue, according to the rule, *pater est quem justae nuptiae demonstrant.* But in regard to a mother, the general rule, subject to certain specific exceptions, is that she "makes no bastard" so far as intestate succession to her property is concerned. It was a matter of dispute among the Dutch writers whether this rule entitled bastards to succeed *ab intestato*, not only to their mother but also to their maternal relatives. *Bynkershoek* (Qu. Jur. Civ., 3, 11) writes doubtfully on the subject, but the authorities cited by him rather favour the affirmative view. Among the more modern text-writers *Van der Linden* (Inst. 1, 3, 4) inclined to the opinion that bastards do not succeed *ab intestato* to their mother's relations, whilst *Van der Keessel* (Thes., 342, 345) says that by the law of Zeeland, North Holland and the southern part of Holland, excepting South Holland proper, bastards do succeed. In this colony the question has been practically decided in **Mogamat Jassiem's case* (1 Sheil, 212) where it was held that illegitimate children of the same mother are entitled to succeed each other *ab intestato.* If, therefore, in the present case, Johanna's father had survived her and then died intestate, her illegitimate children would have been entitled to share with her legitimate children in her share of her father's inheritance. But it does not follow that because the law directs such a distribution in case of intestacy the necessary presumption is that a testator, in providing for the issue of a daughter, intended a similar distribution. On the contrary, in the absence of clear indications in the will of a different intention, the presumption is that the term "issue" or "children" was intended to include only legitimate issue or children. *Voet* (36, 1, 13) puts the case of a testator who knowing that a woman over seventy years of age has only illegitimate children, burthens her inheritance with a *fidei-commissum* in case she should die without leaving children. In such a case he is of opinion that the presumption in

* 8 Juta, 259.

favour of legitimate children being intended is rebutted by indications to the contrary in the will In the absence of any such indications he is clearly of opinion that the term "children" should be confined to legitimate children. In the present case there is nothing in the will to indicate any desire on the testator's part to provide for any illegitimate children his daughter might have. There were legitimate children in existence at the time of his death and they alone are entitled to succeed as fidei-commissaries. The application to amend the account must therefore be granted with costs out of the testator's estate.

Their lordships concurred.

[Applicant's Attorney, C. C. Silberbauer; Respondent's Attorney, V. A. van der Byl.]

DIVISIONAL COUNCIL OF WILLOWMORE V. DES VAGES. { 1896. June 1st.

Appeal—Bad repair of roads—Divisional Council liability.

This was an appeal from a judgment, dated 27th April, 1896, of the Court of the Resident Magistrate for Willowmore in a suit in which the plaintiff (now respondent) claimed payment of the sum of £5 as and for damages sustained by the injury to his cart in consequence of the defendant's (now appellants) roads not having been kept in a proper state of repair, and in which suit the said Court gave judgment for the plaintiff for £3 with costs.

Before the Resident Magistrate the defendant's agent raised a special plea of contributory negligence, to which plaintiff's agent excepted that the plea was embarrassing. This exception being upheld, defendant pleaded the general issue.

The following were the Resident Magistrate's reasons:

In this case the Divisional Council of Willowmore are summoned by Mr. Des Vages for the sum of five pounds sterling, damages for an accident which happened in a drift on the Divisional Council road between Willowmore and a farm called Leeuwkloof, the accident being due to a non-feasance of the Council in omitting to keep in repair a divisional road. After hearing all the evidence offered and hearing the argument of both sides, I gave judgment for the plaintiff with costs, and an appeal has been noted against my judgment.

The defendant's agent in replying to the summons pleaded (*a*) the general issue (*b*) contributory negligence, and admitted that the road in question was a Divisional Council road. The plaintiff's attorney excepted to the pleas as being inconsistent, and I upheld the exception. I can find no direct authority for so doing, but it is clear from the case of *De Kock* v. *Town Council of Cape Town* (4 Juta, 458) that the onus of proving contributory negligence lies on defendant, and that this must be done generally by leading evidence which evidence must follow the plea. I hold that it is necessary to specially plead contributory negligence. It has been decided in slander cases that the general issue and justification are inconsistent, and by analogy of reasoning the same doctrine applies to general issue and contributory negligence; the former being a denial of the allegations while the latter practically admits the accident to have happened, but says no loss would have resulted but for plaintiff's action—a practical justification. Holding these views I upheld the plaintiff's exception, and I left it to defendant to decide under which he would choose, noting my ruling on record. He chose the general issue, though as he had apparently worked his case for presentation to the Court, presuming that he could rely on both pleas, I permitted evidence which perhaps strictly speaking was not relevant under the general issue.

Defendant admits that the road in question is a Divisional Council road and therefore the provisions of section 14 of Act 40 of 1889 apply; that is say, the duty is imposed upon the Council of keeping the roads in repair not to the extent of funds, but in thorough repair—*vis major* accepted—which exceptions lying peculiarly within the knowledge of the Council must be proved by them and in support of which not a word of evidence was given.

The evidence given was most conflicting, more especially to the width of the hole in the road extending between 2 feet 10 inch and 4 feet but the discrepancy in this direction was not of much consequence, as taking the most favourable view to the Council I cannot consider allowing a hole 2 feet 10 inch the proper performance of the duty of repairing roads cast by statute on this body.

Sitting as a juror in this case I find the following as facts:

"That on the date mentioned in the summons a cart drawn by two mules, the property of the plaintiff, driven by a servant in plaintiff's employ with due care and prudence (the cart being then in good order save and except one broken leaf on the left spring which breakage I find did not contribute to the accident) along a divisional road between Leeuwkloof and Willowmore of which road the defendants are the custodians and that the cart thus driven fell into a large deep hole in the road, on one side of which was a direct fall, the other side

sloping, the wheel went down the slope and collided against the embankment with some force, smashing both the springs; that the plaintiff suffered damages by this accident to the extent of £305."

Relying upon the case of **Divisional Council, Cathcart* v. *Hart* (2 Sheil, 28) as to the legal responsibilities of Councils and on the above facts, and on a careful scrutiny of the evidence given in respect of damages, I gave judgment for the plaintiff for £3 damages with costs of suit.

Mr. Watermeyer appeared for appellants, Mr. Graham for respondent.

The appeal was dismissed with costs.

The Chief Justice said: The Magistrate had allowed the exceptions, and evidence was given in support of the plea of contributory negligence. It did not appear that evidence was excluded, nor did it appear that the Magistrate did not bear in mind the whole of the evidence given. The main question therefore was to consider whether there was sufficient evidence to justify the verdict. The Court was bound to say that if the Magistrate's decision had been the other way it would not have been found fault with; but the Magistrate had the benefit of seeing the witnesses and of observing their demeanour, which this Court had not. The Magistrate came to the conclusion that the hole was a deep one; that the driver was careful; that the cart was not so seriously injured before the accident as to justify a plea of contributory negligence. Under these circumstances the appeal would be dismissed with costs.

[Appellant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorneys, Messrs. Fairbridge, Arderne and Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

Ex parte LIQUIDATORS UNION BANK. { 1896. June 2nd.

On the application of Mr. Close, Mr. Henry Gibson, as secretary of the South African Association, was given leave of absence from his duty as a joint official liquidator of the Union Bank for five months whilst absent in England; and Mr. Buyskes, bookkeeper of the South African Association, was authorised to act on his behalf in the liquidation.

* 9 Juta, 80.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

HEYDENREYCH V. BEHR. { 1896. June 3rd.

This was an action for restoration of property.

Mr. Graham (with whom was Mr. Close) appeared for the plaintiff.

Mr. Sheil (with whom was Mr. Buchanan) appeared for the defendant.

By consent the case was postponed until August 1 next.

MEIRING V. KRUGER. { 1896. June 3rd.

This was an appeal from the decision of the Resident Magistrate of Fraserburg.

Mr. Graham appeared for the appellant (plaintiff in the Court below) against a judgment of the Resident Magistrate on a claim for £12 12s. (with costs) for medical attendance, the Resident Magistrate having given judgment for plaintiff for convention and also for defendant in reconvention for £11 7s. with costs, leaving a balance of £1 5s. with costs in favour of plaintiff.

The Chief Justice said: I think the Magistrate ought in this case to have attached some weight to the defendant's letter in which he acknowledged receiving the doctor's account and promised to pay. But the Magistrate seems to have lost sight altogether of that letter, and merely because the defendant afterwards denied that there had been this tender he disallowed the item of £2 7s. Then in regard to the dog I am half inclined to strike that item out altogether. The Magistrate thought, however, in the conflict of evidence, that there was an implied promise on the part of the plaintiff to pay for the keep of the dog. The judgment for 10s. per month seems very high for the keep of the dog.

But the Court will not quarrel with that, though the amount awarded goes beyond August, when the plaintiff gave notice that he would not longer be responsible for the keep of the dog, and £2 must, therefore, be deducted in that respect. Judgment was given for £1 5s., but to that amount must be added £4 7s., making a total of £5 12s. The Court will allow the appeal with costs, and the amended judgment will be judgment for the plaintiff for £5 12s., instead of £1 5s., with costs in the Court below.

[Appellant's Attorney. G. M. Walker.]

QUEEN v. SCHULZ. { 1896. June 3rd.

Servitude — Wood-cutting — Prescription — Criminal conviction—Summons.

The servitude of cutting wood on one person's land may be acquired by prescription by the owners of other land if they have for thirty years or upwards continuously cut wood thereon peacefully, openly, and as of right.

The 8th section of the Forest Act, 1888, *authorises the Commissioner to make rules to regulate the use of trees or forest produce by persons having a servitude of wood-cutting on Crown forest and imposes a pecuniary penalty for a contravention of any such rule.*

The appellant, being entitled to such a servitude, cut wood in a Crown forest in a manner prohibited by regulations framed under the Act, but was prosecuted for a contravention of the 16th section, which does not apply to persons entitled to such a servitude and which allows a much severer penalty than can be imposed for a contravention of the regulations.

Held that *the conviction must be quashed.*

This was an appeal from the conviction of the accused before the Resident Magistrate of King William's Town on a charge of cutting or removing from an undemarcated Crown forest a reserved sneezewood tree without a licence.

Mr. Searle, Q.C., appeared for the appellant.

Mr. Sheil (Assistant Law Adviser) appeared for the Crown.

The accused was charged with the crime of contravening section 16, sub-section (*a*), Act 28 of 1888, in that upon the 20th day of February, 1896, and at Frankfort in the district of King William's Town, the said Frederick Schultz, jun., did wrongfully and unlawfully cut or remove from an undemarcated crown forest one reserved tree, to wit a sneezewood tree, without a licence.

The defendant in his plea admitting cutting a sneezewood pole upon the Frankfort Commonage, but says he did so with the leave and licence and by the order of the Frankfort Board of Management. The defendant denies that the place where he cut the said pole is undemarcated Crown forest, but says that the said Board, as representing the landowners of Frankfort, are entitled to all forest growing on the Frankfort Commonage.

The Resident Magistrate convicted the prisoner and fined him 20s. or twenty-four hours, imprisonment.

Section 12 of the Regulations for the Village Management Board, Frankfort, reads as follows:

"No person shall be allowed to chop wood of any description on the Commonage without the consent of the Board, and then only at such places as shall be pointed out by the Board, and on payment of a fee of 2s. for a small wagon and 5s. for a buck-wagon load. No such payment shall entitle any person to chop wood except for his or her private use, and not for sale or marketable purposes"

Mr. Searle argued that section 16, Act 23 of 1888, was the wrong section to charge under there are other sections dealing with cases in municipal areas. Question is whether the Crown has reserved rights of timber on this land.

Mr. Justice Buchanan: Where's the proof of ownership here?

Mr. Searle said: The land is in the proclaimed area of the municipality. The Government could have taken the proceedings in sections 8, 9, 12. It was never contemplated that section 16 should still apply.

The German legion have always claimed the wood on this area. Only of recent years the Government has made claim to it, a claim resisted at once by the Frankfort Village Management Board. The whole tenour of this Act is to preserve existing rights. The Government should have taken steps under 8th, 9th, and 12th sections and then issued regulations. Moreover, all along the Board has claimed it. The Government now claim. There is a *bona-fide* dispute; therefore it is improper to prosecute. See *Queen* v. *Arnoldus* (2 Sheil, 145). The right should have been decided by an action. The Act for which the prosecution was brought was done in assertion of a right. In *Home's case* (4 Sheil, 335), of course, the Government only prosecuted for such an offence in the municipality *after* regulations had been issued,

The Chief Justice: Commonage is not vested in Village Management Boards. They have only servitude, viz., grazing and perhaps cutting down some trees. Can they cut down all trees, reserved and otherwise?

Mr. Searle: The proof is that for over thirty years the Village Management Board have cut. The 16th section does not apply, because it is not undemarcated forest. If it were demarcated regulations need not be issued. This being undemarcated forest regulations should be issued in regard to it. The Government Proclamation of 1884, approving of Village Management Board Regulations of 1884, vests all wood of any description in the Board. Further steps would be required to revest in the Government. The Crown did not retain the right to timber, and it is therefore not an undemarcated forest. If it did not retain that right the proper way is to make regulations and then penalties could be imposed. No regulations have been framed under section 8. There are general regulations under the Act; if anything, the prosecution should have been under the second of those regulations. The Crown only claims the right to reserved trees and can only do so by virtue of the regulations. The prisoners were only charged with contravention of sub-section (*a*) of section 16, not sub-section (*b*).

Mr. Sheil: The fact of cutting has been admitted by the appellant. His conviction therefore is right unless he can show that the Municipality acquired by prescription or by grant. Now grant to go against Crown must be clear. It is absurd to say that there is a grant if it is based on section 12 of the Village Management Board Regulations. As to prescription—section 8 of the Act and the regulations under it contemplates that a servitude has been acquired by prescription. Prescription has not here run because prescription must be *nec vi nec clam nec precario*. This is a "precarious" right, for Mr. Lister, Superintendent of Forests, says that they came for licences to cut this wood and one of the witnesses acknowledged that they had no right to cut reserved trees. *Meintjes* v. *Oberhausen* (3 Searle, 265) is important on the question of divesting the Crown under section 12 of the Village Management Board Regulations. If Government had prosecuted under the regulations, the Crown would have had to admit there was a servitude, which we do not.

The Chief Justice said: If the appellant had not been authorised by the owner of a Frankfort allotment to cut wood on the land in question he would no doubt have been liable to prosecution for a contravention of the 16th section of the Forest Act, 1888. The timber growing on the land belongs to the Crown whatever servitudes may exist on the land, and therefore the land is included in the term "demarcated forest" as defined by the Act. But the question still remains whether the owner of a Frankfort allotment or a person duly authorised by the Village Management Board to cut wood, as the appellant was, can be prosecuted under the 16th section for cutting such wood. In 1857 German immigrants were located at Frankfort in consideration of their services in the German legion, and were told that the villagers would have the right to cut wood on the Commonage. They continuously exercised this right without interruption peacefully, openly, and without asking any one's consent, until the year 1888 when the Forest Act was passed. The servitude of cutting wood is not unknown to our law and the 8th section of the Act distinctly recognises the existence of such servitude. The owners of allotments in Frankfort have, in my opinion, acquired such a servitude by prescription. The 8th section of the Act provides that in case there be any servitude or right of wood-cutting upon any Crown forest the Commissioner may make rules to regulate the use of the trees of the forest produce. The 9th section enacts that any person or municipal or other body contravening any such regulations shall be liable to a fine of £20. Regulations have been duly made and it may well be that the appellant has contravened one of them and thus rendered himself liable to prosecution. But he has been prosecuted for a contravention of the 16th section, under which he would be liable to imprisonment with hard labour for twelve months without the option of a fine. No application was made at the trial on behalf of the prosecution to amend the summons, and the reason now given is that the Government denies the existence of any servitude in the present case. Holding as I do that the servitude has been acquired by prescription, I am of opinion that the appellant ought to have been prosecuted for a contravention of the Government regulations and that the conviction under the 16th section must be quashed.

Mr. Justice Buchanan said: I concur. In my opinion, the inhabitants of Frankfort have established a right of cutting wood by servitude, and having established this right by prescription the prosecution ought not to have been taken under the 16th section.

Mr. Justice Maasdorp also concurred.

[Appellant's Attorney's, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

WYLIE V. WYLIE. { 1896. June 4th.

This was an action for judicial separation, originally instituted for restitution of conjugal rights, by the husband against the wife. The marriage was admitted. It was by ante-nuptial contract. The parties were married on March 1, 1881. Mrs. Wylie, in a claim in reconvention, charged her husband with acts of cruelty and violence, and claimed a decree of judicial separation.

Mr. Sheil appeared for the applicant, the original plaintiff in the action. Mr. Graham, with whom was Mr. Watermeyer, appeared for the plaintiff in reconvention, the defendant in the original action.

Mr. Sheil applied for a postponement of the trial until the August term, on the ground that two children, who were material witnesses, had been removed clandestinely to England.

After argument,

The Court decided that the case must proceed. The Court would not give judgment unless it found it absolutely necessary to hear the evidence of the children.

Mr. Sheil said he was only instructed to apply for the postponement and withdrew.

The husband said he was not that day prepared to go on and conduct his own case. He intended to instruct counsel if the case was postponed.

Mr. Graham stated that Mrs. Wylie wished to go up to Kimberley as soon as possible. Notice of trial was given so far back as May 9.

The Chief Justice: The case must proceed. Mr. Wylie appears to be quite able to conduct his own case.

The husband said he was not prepared with his witnesses.

The case then proceeded.

Mr. Wylie stated that he lived in the Colony some time alone. He went to Kimberley in 1891, after which he came down to Cape Town in 1893, his wife following him. He afterwards went to England, leaving his wife at Sea Point. His wife subsequently took over the management of Rocklands boarding-house, Sea Point. In November, 1894, when the house was found not to be supporting he went to Johannesburg, where he joined the staff of the "Standard and Diggers' News." In November, 1895, he returned to Cape Town suffering from an attack of influenza. He afterwards got a letter saying he was not to return to Johannesburg. His wife refused to share the same room with him and tried to turn him out of the house. He was ultimately obliged to take rooms elsewhere. Afterwards his eldest boy joined him. Arrangements had been tried for him to have the children, and Mrs. Wylie to go to Kimberley to nurse. The conduct of the house was not satisfactory in so far as regarded his wife running him into debt. His wife had written letters saying that she had nothing to say against him, she only wished to make him work.

Cross-examined by Mr. Graham: When he came to the Cape in 1889 his position was embarrassed. He owed about £1,200. His wife had worked in a shop in England. He was in a lawyer's office in Woolwich earning 10s. a week. Afterwards he was at Aldershot going through a Volunteer Medical Staff Corps course. At that time his wife was not employed in a shop. He came out originally as the secretary of the Stock Exchange. When his wife came out he was living in a house at Wynberg, and had a dog-cart. His salary was £700 a year. His wife was not more anxious to reduce his debts than he was. In July, 1889, he received £1,[illegible]0; at Christmas, 1889, he was in debt. Afterwards he was secretary of the Golf Club. He had never drunk immoderately, but at times had had more than was good for him. He had never struck Mrs. Wylie in his life. The Standard Bank sequestrated his estate. He got employment in De Beers, Kimberley, through the introduction of a gentleman in England, and through Sir James Sivewright. He went up in a first-class carriage with a second-class ticket. This was through the permission of Sir James Sivewright. Out of £94 he received in Kimberley he sent his wife £62. He lived there quite quietly. It was not a fact that he had offered to sell certain documents to Mr. Rhodes for £20,000. These documents were afterwards published in the "Financial News" and the "Standard and Diggers' News." He never got a penny for them, although Mr. Mendelsohn, of the "Standard and Diggers' News," offered him money for them. He thought the documents ought to be published in the interests of the shareholders of De Beers, so as to prevent their being defrauded. The documents were extracts he had made from the private minutes of De Beers Company; and concerned the purchase of the British United Company by Messrs. Barnato, Beit, and Rhodes. He told Mr. Rhodes he intended to publish them, and Mr. Rhodes said that if he did he (Mr. Rhodes) would ruin him.

Mr. Rhodes did not turn him out of his office. Witness afterwards went to England, where he again borrowed money. When he got back to Rocklands he helped his wife in the work. During the eleven months he was in Johannesburg he sent his wife £29 and paid about £20 off the debts. When he came from Johannesburg he brought only £1 with him. He had never assaulted his wife. When he returned from the theatre one night with Colonel Spence he was not drunk. Colonel Spence, who stayed in the house, was awakened and asked if witness was drunk when he returned from the theatre. Colonel Spence replied in the negative. At that time he was "writing for the papers." He had offered money to his wife and she had refused it. He had written for the "Standard and Diggers' News" and the "Saturday Review." He had applied for a post on the "Telegraph" and Mr. Stuart had promised to employ him, but Mr. Stuart went away. His boy in the telegraph school had given him a portion of his money for clothes. The bulk of the furniture had been sold, but a great many articles disappeared between the day Mrs. Wylie gave up the boarding-house and the sale. He intercepted letters from his wife to a lady friend.

Douglas Wylie, the son, said he was living with his father at Sea Point. He left his mother about six months ago. There were quarrels between his father and mother before he left. He remembered a joke being passed about "another of father's girls." He had been into bars with his father, who did not drink much. He had heard his mother use abusive language to his father. He could not remember the language. His mother was always saying his father was drinking, but witness had never seen him drunk. Witness, with his father and Colonel Spence, went to the theatre one night, when his father only had two drinks. Witness had taken £15 from his father to his mother, who would not take it. He had seen his mother lying down in Mr. Good's room.

Cross-examined by Mr. Graham: Witness was staying at Mount Nelson, Sea Point. His mother gave him the suit he had on two days ago. One day when he was at lunch with his mother his father sent a constable after him.

Mr. Graham called

Agnes Jean Wylie, the wife, who said that they were married in Scotland. She had had to work in a shop in England because of her husband's extravagance. When she came out here she found a dog-cart waiting for her at Wynberg, into which she refused to get. Eventually she consented to live as he did, because he said it would ruin his credit if she did not. He had taken to drink, and was very extravagant. He had told her that now that she was in the Colony he could do as he liked with her. When she left Wynberg she worked as a nurse. That was whilst her husband was in Kimberley. Then she went to Kimberley and joined her husband. His salary there was £30 a month. Witness herself worked as a nurse. She begged of him to give up speculating in the extracts from the minutes. The De Beers Company were very good to them, and allowed them a free house. He told witness he was going to give Mr. Rhodes the first chance of buying his information. He said he meant to get hush-money from Mr. Rhodes, and said that Mr. Rhodes had paid hush-money to others. Witness told him he should not be so dishonourable. Afterwards her husband told her she would have to go to work again, and Rocklands was taken. He began to drink very much. He used to take money from the house and buy whisky at the Waverley Hotel. He contributed nothing to her support, and had on one occasion dragged her across the floor. She locked herself in Mr. Good's room because it had the strongest lock upon the door. Just before witness left Rocklands in March the two children were sent home. Her friends gave them a home. If she got the custody of the eldest boy, friends in Cape Town would look after him.

Cross-examined: Her husband had never objected to her nursing in Kimberley. Witness had certainly had a reasonable amount of drink every day. She had had £15 offered to her after the trouble. Witness had not consulted her husband about sending the children home. She had not left Rocklands in a dirty state.

Frederick Green, in the employ of Mr. Tregidga, said that he was general servant with Mr. Wylie in 1889. At that time Mr. Wylie drank heavily and used abusive language to Mrs. Wylie. He would have been violent if he had not been stopped.

Cross-examined: Witness was not dismissed for neglect of duty. Witness did not know where Mr. Wylie was until he met him in the Bodega a few weeks ago.

Arthur William Bishop, engineer, who stayed at Rocklands from February, 1894, to May 1895, said he remembered the night of the alleged assault. Mr. Wylie was not drunk. Afterwards shouts were heard, and witness and Mr. Good removed Mr. Wylie from the room. Witness had never seen Mr. Wylie do anything.

The Chief Justice said that on the claim in convention there would be judgment for defendant with costs. On the claim in reconvention judgment would be deferred till the 1st day of August next for the production of evidence on either side as to the cruelty. The husband

would in the meanwhile be interdicted from interfering with the person or property of his wife, who would also have the custody of the minor children, with the exception of the boy Douglas. The latter would remain with his father, though the mother could apply on motion at any time for the custody of this boy should the father's custody not be satisfactory.

Their lordships concurred.

[Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS (Chief Justice), Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

GLOVER V. GLOVER. { 1896. June 5th.

This was an action for judicial separation brought by the wife against the husband.

Mr. Graham appeared for the plaintiff.

Margaret Julia Glover said she was married in April, 1883. She lived with her husband happily six months. They lived at Salt River. He came home intoxicated, and continued his drinking habits until two and a half years afterwards she went to her brother. At this time her husband threatened to do for her. He caught her by the throat and hurt her very much. She went back to him, but he continued to ill-treat witness until 1890, when they separated. Witness then went to England with her three children. Under the separation her husband was to allow her £8 a month, but only paid three months. Witness returned to live with her husband again in 1893. He commenced drinking again, and after six months he again ill-treated her, continually striking her in the face. On one occasion he threw water over her and threatened to murder her. He gave her a fearful black eye, and one morning threw her on the floor and rubbed snuff in her eye. Subsequently witness left her husband. He came one night to the house in which she was staying with a cab, and threatened to remove her by force. He said he would kill the three children who were in his custody.

Rosa Nelson, who had been a domestic servant to the parties, said she had seen Mr. Glover smack his wife on her face. She had heard him use bad language, and had seen Mrs. Glover with a "blue eye."

Ethel Glover, the eldest child, said she would rather stay with her mother than with her father. He did not treat them well. She did not go to school.

Decree of judicial separation was granted, plaintiff to have the custody of the minor children. An order was made that defendant pay the plaintiff £5 a month towards her maintenance, with leave to the plaintiff to apply for an increase.

[Plaintiff's Attorney, Gus. Trollip.]

WILLIAMS V. WILLIAMS. { 1896. June 5th.

Joint will—Husband and wife—Executor—Legatee—Transfer—Mortgage—*Rei vindicatio*—Tacit hypothecation.

Husband and wife, married in community, made a joint will, by which, inter alia, *they bequeathed a certain farm to the plaintiff subject to a usufruct in favour of the survivor. The husband was the survivor and accepted benefits under the will, the land stood registered in his name, and after taking out letters of confirmation as executor of his wife's estate, he transferred one-sixth share of the farm to the defendant.*

Held, *in an action brought by the plaintiff to set aside the transfer, that the plea that the transfer had been made* bona-fide *for valuable consideration without knowledge of the plaintiff's rights under the will was a valid answer to the declaration.*

This was an action brought by Rosa Catharina Williams against William Henry Williams.

The plaintiff's declaration was:

1. The plaintiff resides at Stinkfontein, Cronstadt, in the Orange Free State; the defendant is a farmer residing at Berg River, in the division of Uitenhage.

2. On the 16th February, 1874, the parents of the plaintiff, Uriah Rutgert Williams and Maria Cornelia Williams (born Muller), who were married in community of property, executed their mutual will, wherein the first dying appointed the survivor together with the child or children of the marriage to be his or her universal heirs.

3. After making provisions about the movables of the estate, the will provided that the immovable property should remain in possession of

the survivor during his or her life, and that after the death of the survivor the said property should devolve in equal portions upon the children of their marriage or the descendants. In particular the testator's share in the farm Berg River was so bequeathed for the sum of £500, the said bequest money to be for the benefit of the joint heirs of the testators. The plaintiff annexes hereto as part of the declaration a copy of the said will.

4. The said M. C. Williams died on or about the 28th May, 1874, leaving the said mutual will of full force and effect. At her death she and her husband were possessed of one-half share in the said farm Berg River, registered in the name of the said U. R. Williams.

5. The plaintiff is the only child born of the marriage of the said U. R. Williams and M. C. Williams, and she became of age in November, 1894.

6. The said U. R. Williams adiated and accepted benefits under the mutual will aforesaid, and duly took out letters of administration as the executor testamentary of his said wife.

7. Thereafter, on or about the 6th October, 1880, the said U. R. Williams transferred one-sixth share in Berg River to the defendant, in whose name it is now registered.

8. Under the said mutual will, and subject to the usufruct of U. R. Williams, the property in the said one-half share in Berg River belonged to the plaintiff, and the said U. R. Williams had no right or authority to transfer to the defendant the said one-sixth share in Berg River.

Wherefore the plaintiff claims:

(*a*) An order declaring that the said transfer is void, and that, subject to the usufruct of U. R. Williams, the property attempted to be transferred belongs to the plaintiff.

(*b*) A perpetual interdict restraining the defendant from alienating, transferring, or encumbering the said one-sixth share of Berg River.

(*c*) An order binding the defendant to pass transfer of the said one-sixth share to the plaintiff on the death of U. R. Williams.

For a plea to the declaration the defendant said:

1. He admits the allegations in the first and fifth paragraphs.

2. As to the second paragraph he denies that the document, copy whereof is annexed to the declaration, is a valid will. He says that the signature purporting to be that of the said M. C. Williams, plaintiff's mother, was made shortly after her death by a certain Mrs. Van der Walt, wife of one J. J. van der Walt, then living at Diep River, in the Humansdorp district, and that at or about the same date, and shortly after the death of the said M. C. Williams, the said J. J. van der Walt and one A. M. Muller, then residing at Diep River, signed their names as witnesses; but the testators and witnesses were never present at the same time when the said document was signed and witnessed; that the said document is therefore wholly invalid as a will as not having been executed according to law.

3. As to the third paragraph, he says that for the provisions contained in the said document he craves leave to refer to the terms thereof.

4. He admits that one-half of the said farm Berg River was registered in the said Uriah Williams's name at the death of his wife in 1874. He says that one-sixth share of the said farm was purchased by the said U. Williams in or about 1864, and that in or about 1871 he, the defendant, and the said U. Williams jointly purchased the one-third share from the estate of one Van der Walt for the sum of £200, of which sum each paid one-half; that by error the whole one-third share was transferred in the said U. Williams's name, but that the defendant took possession of his one-sixth share in or about 1871, and has continued in possession ever since; that in or about 1880 the said U. Williams transferred the one-sixth share so purchased by the defendant to him, but that by error, declarations of seller and purchaser were signed stating that the said sale had taken place in 1880.

5. He admits that the said U. Williams adopted the provisions of the said will and took benefits thereunder as though the same were a valid will, and he admits the allegations in paragraph 7, but denies those in paragraph 8.

6. He submits that the said alleged will being invalid, the plaintiff has no claim in respect of any other share than the one-third share now registered in the said U. Williams name.

Wherefore he prays that the said claim be dismissed with costs.

And in case the said plea as to the invalidity of the said will be not upheld, but not otherwise, the defendant says:

1. He craves leave to refer to the matters above pleaded.

2. He says that he purchased the one-sixth share of the farm in 1871, from the estate of Van der Walt, before the death of the said M. C. Williams, plaintiff's mother; that he paid the purchase price thereof, and took possession; that the transfer in 1880 was passed in order to rectify the error originally made when the whole one-third share was transferred to the said U. Williams, and that the declarations of

seller and purchaser stating that the sale was made in 1880, were signed in error without full understanding of their contents.

Wherefore he prays that plaintiff's claim be dismissed with costs.

And in case the above pleas be overruled, the defendant says:

1. He craves leave to refer to the matters above pleaded.

2. The transfer to him of the said one-sixth share in 1880 was made *bona-fide* and for valuable consideration, and without knowledge that the plaintiff was awarded any rights to the said share under the will by the defendant, who was executor in the estate of the said M. C. Williams, and by reason of the above the said transfer cannot now be set aside.

Wherefore he prays that the plaintiff's claim be dismissed with costs.

And in case the above pleas be overruled, but not otherwise, the defendant says:

1. He craves leave to refer to the matters above pleaded.

2. He has been in *bona-fide* possession of the said farm since 1871 under the full belief that he was owner thereof. Since the said date he has made improvements which have enhanced the value of the said farm to the extent of £600 sterling.

3. He is entitled to retain possession of the said farm until compensated in the above amount.

4. The plaintiff has not tendered any compensation to the defendant.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

As a replication to defendant's plea plaintiff said:

1. She joins issue with defendant on the first two pleas of his defence and all the paragraphs thereof, save in so far as the same contain admissions.

2. She excepts to paragraph 2 of defendant's third plea, as raising no defence sufficient in law, inasmuch as the purchase, *bona-fide* and for valuable consideration, of a minor's immovable property from an executor who is not authorised by the Court to sell, cannot in any case prejudice the minor's legal rights.

In the alternative she joins issue with defendant on his third plea, save in so far as the same contains admissions.

3. She similarly joins issue on the fourth plea; and says, in the alternative, in answer to the plea of non-tender of compensation for alleged improvements, that she does not claim immediate possession of the property in dispute, and refers this Honourable Court to prayers (*b*) and (*c*) of the declaration.

Wherefore plaintiff again prays for judgment against defendant with costs.

Mr. Searle, Q.C., for plaintiff, Mr. Smuts for defendant.

On the hearing of the exception—after argument:

The Chief Justice said: The exception taken to the plea cannot be sustained. The declaration prays for an order that the transfer of one-sixth part of the farm Berg River made by the testator in favour of the defendant should be declared null and void on the ground that by the joint will of the testator and his wife, who had been married in community of property, the farm had been bequeathed to the plaintiff, subject only to a usufruct in favour of the survivor. It is admitted that the testator was the survivor and accepted benefits under the will, that the land stood registered in his name on the death of his wife, and that when he transferred the one-sixth share to the defendant he was executor of his deceased wife's estate. The plea to which exception is taken is that the transfer to the defendant was made *bona-fide* and for valuable consideration, and without knowledge of the plaintiff's rights under the will. In support of the exception, counsel relies upon the well-known rule of the Dutch law that legatees and fidei-commissaries are entitled to a *rei vindicatio* as well as an hypothecary action in respect of property bequeathed either directly or subject to a *fidei-commissum*. That rule has so frequently been explained in this Court, notably in *Lange* v. *Liesching* (Foord 55), as to require no further elucidation. One of the most important qualifications of the rule is that where an executor has sold property belonging to an estate the property cannot be followed into the hands of a *bona-fide* purchaser who without knowledge of the rights of the legatees or fidei-commissaries has received transfer or delivery of the property. It is the duty of an executor to pay the debts of the estate and to realise so much of the assets as is required for that purpose. If he unnecessarily sells property which is specifically bequeathed by the testator's will he renders himself liable to the legatees, but the transfer or delivery made by him to the purchaser cannot be set aside unless such purchaser was aware or ought to have been aware of the breach of trust. The passing of a bond by an executor stands on a different footing. It is the duty of an executor to sell assets when he requires funds, but not to pass bonds on the property unless thereto authorised by the will or by order of Court. If therefore the survivor, being executor of the estate of the first dying, has mortgaged land of the joint estate the

Court will take upon itself the duty of inquiring whether such mortgage was for the benefit of the estate and whether the money raised on loan was actually required for the payment of debts. As to the survivor's half of the property so mortgaged the legatees can have no real or hypothecary right in respect thereof, but as to the half share of the deceased the rights of the legatees will always be protected. In the case of *Van Rooyen* v. *McColl* (3 Juta, 284) it was clearly laid down that minors can have no tacit hypothecation upon the half-share of the surviving parent. It was also held that, as to the half-share of the deceased parent a bond passed with the *bona-fide* object of paying the debts of the estate would not be set aside, even although not previously authorised by the Court, provided that the passing of the bond was for the benefit of the estate and that the proceeds were duly applied to the payment of debts. In that case, however, all the proceeds were not so applied. It was impossible from the evidence to discover the exact amount which had been misapplied and, by common consent, the minor's hypothecary claim to a fairly equivalent portion of the proceeds was recognised in the distribution of the proceeds of the sale to be made in execution of the judgment of the Court on the bond. That case has sometimes been regarded as conflicting with other cases bearing on joint wills and cognate subjects, but when closely examined certain consistent general principles will be found to underlie them all. In the present case the Court has to deal with a transfer and not a mortgage bond. If the whole of the land registered in the survivor's name had been transferred by him as executor the plea of *bona-fide* purchase without notice would have been good, but the plea is strengthened by the fact that only one-sixth of the farm, and therefore less than the survivor's own half-share, has been transferred to the defendant. The exception must therefore be disallowed with costs.

Their lordships concurred.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorney, C. C. Silberbauer.]

HENNINGS V. GROBLER. { 1896. June 5th.

Fencing—Act 30 of 1883—Section 7.

This was an appeal from the decision of the Assistant Resident Magistrate, Burghersdorp, in a case in which the appellant Hennings was sued by the respondent for the sum of £12 7s. 6d., being the half share of the cost of fencing the boundary between the appellant and respondent's property, under the provisions of the Fencing Act, No. 30 of 1883. The Assistant Resident Magistrate gave a judgment for the present respondent. The appellant contended that respondent had not fenced his property as ordered by arbitration, and therefore had no power to sue.

Mr. Searle, Q.C., for the appellant; Mr. Graham for the respondent.

After argument,

The Court dismissed the appeal with costs.

The Chief Justice: It is not denied in this case on behalf of the defendant, that the plaintiff made a fence of considerably larger extent than the fence made by the defendant. The difference is really 1,316 yards, but plaintiff only claims for 591 yards. Still it is not denied on the part of the defendant that the charge is a fair one. It is £3 16s. 6d. the half-share, and half-share of the costs £3 11s., making altogether £12 7s. 6d., so that really the amount is not in dispute. The defence raised is that the plaintiff could not claim to fence his own part—if anything was to be fenced the whole boundary between the two farms must be fenced. Now, the 7th section of the Act No. 30 of 1883 says that any person wishing the boundary to be fenced between his property and the property adjoining must serve upon the occupier of that property a notice in writing, which, among other things, shall specify the boundary to be fenced. I quite agree that the arbitrator is not bound to accept the particular piece of boundary which the applicant chooses to fix. The arbitrator under the Act would be quite justified in saying, "It is not fair to pick out only that particular portion, and we shall not order the other party to pay any costs of fencing if only that particular portion is to be fenced." I think there is a pretty fair indication in the present case as to what the plaintiff really intended. He spoke as to the respective portions of these two farms. It is true the plaintiff was at the time occupier of the whole, but he does not speak of portions "respectively occupied by us," but practically speaks of "portions respectively owned by us." The arbitrator so understood him in my opinion, and when he gave his award, referred to the portions of which they were "respectively owners." Now the mistake the defendant made in this case was in not appointing his own arbitrator. If two arbitrators had been appointed, they might have said this was unfair and the whole should be fenced, but the sole arbitrator practically decided that only a portion was to be fenced in, and after he had given his award, I think his award was quite capable of the con-

struction that only that particular portion was to be fenced; and certainly if there was any evidence to assist in the interpretation of the award, that evidence clearly shows what was intended by the award. Leaving out any such evidence and taking the award as intelligible without evidence, it shows that the portions were those owned by the plaintiff and defendant respectively. After the award the defendant proceeded to fence in a portion, but he did not fence in as much as the plaintiff. The plaintiff is quite justified in asking that the defendant shall contribute at all events for the 591 yards in excess of what he was bound to do. It may be quite competent for the defendant now to take proceedings under the Act to compel the fencing in of the rest, but that question does not arise, and it would have been competent for the defendant if he had appointed an arbitrator to have insisted upon the whole being fenced. He has not taken these proceedings as far as the case has gone now, and the plaintiff is entitled to repayment for these 591 yards. The Magistrate's judgment was therefore correct, and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, G. M. Walker; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS (Chief Justice), Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

COLE v. RILEY. { 1896. June 8th.

This was an action to recover the sum of £70, alleged to be due and owing for certain work performed and materials supplied by the plaintiff. The plaintiff is a boatbuilder, and defendant is a trader, owner of the cutter Wildflower. During 1894 and 1895 certain repairs were done to the cutter by plaintiff amounting altogether to £230, of which £160 had been paid, leaving £70 now claimed. Defendant pleaded that the estimate amounted only to £155 (for which defendant undertook to do the whole of the work), and that £5, making up the £160 was paid for despatch.

Mr. Tredgold appeared for the plaintiff. Mr. Searle, Q.C., with whom was Mr. Watermeyer, for the defendant.

William Cole, the plaintiff, said he had been in business as a boatbuilder nearly forty years, during which time he had known the defendant. In November, 1894, the defendant came to witness to have the Wildflower raised a foot higher and new planks put in. The boat was then afloat. Witness gave defendant an estimate for work amounting to £155. Additional work over and above the estimate had to be done to make the boat serviceable. Witness would rather have lost £10 than undertake the job. Witness refastened the floor timber, with copper bolts, and also the ribs of the boat. The stem was too light, and a heavier one was put in. All this and other work was not in the contract. He estimated the extra work at £80—repairs actually cost £250, but he put his own time in. Practically witness rebuilt the boat. She now carried sixteen tons, previously she was an eight-ton boat. Defendant saw witness working every day, and ordered all to be done as witness suggested, saying, "You know better than I do." Witness was willing to go to arbitration or anything rather than the Court. Witness also fitted the vessel with a copper pump. The defendant denied the plaintiff's statement as to the payment of the extra £5 for despatch. Witness considered that defendant gave him *carte blanche*. Defendant said he would see witness "fair," and he should not lose by the job. The receipts produced were all signed on account of the work; the last being dated May. The cost amounted to £241, but witness only claimed £230. Witness had delivered an account to the defendant.

Cross-examined by Mr. Searle: The letter produced was written by witness—the letter stated that witness could not see his way to do the work for less than the estimated price. Certain extra work was mentioned in the letter, and plaintiff also stated that he thought his estimate reasonable, as he did not know exactly what work would have to be done. Witness never said he would finish the work by 20th February, 1895. Defendant had made no complaints as to delay. Defendant's trade was mostly in carrying penguin eggs, and the season for these was February and March. The work was finished about the end of March, and the boat was launched. On his return from his trip defendant paid £15 on account. A letter of demand was written to defendant in August. He would not like to build such a boat for less than £200. He knew Rich's cutter. It might be a 23-ton boat, but it was built very slight. He did not know what she cost. Plaintiff

charged £134 16s. for labour. This was exactl y what he paid the men. The whole account was lumped together. Other accounts came in subsequently to the first account sent in by plaintiff; that accounted for the difference in amounts. The Knysna Company's account for wood was £13, not £8. The wages to the woodman were at the rate of 8s. a day, £7 4s.

By the Court: Witness sent in the estimate on November 19. Previous to this he had examined the boat, and defendant showed him what he wanted. When he started the work he found more than he expected. He had practically rebuilt the cutter. Witness had worked for the defendant for the last thirty years. Fifteen years ago he put a false keel on the same boat. He had never before charged the defendant with extras. He valued the cutter at present at £250. He would not like to build a boat of that description under £300.

Marten Petersen, a boatman, said he knew the Wildflower. Witness saw the boat nearly every day when she was under repairs. Plaintiff had practically rebuilt the boat. The charge of £230 was not too much for the work done. Originally the boat was very slightly built.

Cross-examined: Witness owned a cargo boat. He was not a ship's carpenter, so did not know much about the work. He formed his opinions as to cost of repairs to his own boat. He did think such a boat as the Wildflower could be built under £200.

Christopher Hales Robertson said he had had considerable experience in boat-building. He knew the cutter belonging to the defendant. He saw her when plaintiff was doing the repairs. He thought £230 a fair charge. He would not take such a job for less than £250. The boat was in a bad state. He would not have trusted his life in her. Defendant afterwards said to witness he would like him to arbitrate between the parties. Defendant was willing to do so rather than go into court to "split the difference."

Cross-examined: The boat was previously only built of 7-8ths plank instead of 1¼ inches. The boat was doing very well, more "by luck than good management." He believed the copper had to be supplied by defendant; something like £35 worth. He seldom did this kind of job, because they did not pay. He had not seen the boat since she was launched.

By the Court: The cutter Wildflower was very poor; she was "made," not built. He considered the cutter was worth £250. Her planks were much thicker than originally. A new boat like the Wildflower would cost £250; she was "better than new" now.

This was the case for the plaintiff.

For the defence

George Riley, the defendant, said the Wildflower was originally a 9-ton cutter. He traded in penguin eggs and fished. In November, 1894, he saw plaintiff as to repairs. Witness got an estimate for £155, but he did not agree to it, saying it was too much. Afterwards plaintiff wrote the letter stating what he might have to do. They then agreed to the £155. Witness never promised to pay more. He expected the boat to be finished by February 20, but it was not. On the 1st February he promised plaintiff an extra £5 if he got it finished by February 20. Plaintiff never said anything as to extra work being paid for. Witness paid £100 for the boat complete. He supplied £40 worth of copper and nails. He thought the payment made by him to the plaintiff in May was in final settlement. Witness had fifty trips in the boat by himself. The boat was one of the best in the Colony.

Cross-examined by Mr. Tredgold: The boat was built at Fishhoek. Witness was down at the boat nearly every day whilst the plaintiff was doing the repairs. Plaintiff did not do the work for which he estimated. He put in a new stern, rudder, and stern post. These were not in the estimate. The boat was raised nine inches; and this necessitated a new stern. Witness still went to sea in the boat. When it blew hard they had to steer by the sail. Now he could not go alone in her. He had complained to the plaintiff about this. The new sheets of copper had to be cut down. Witness sold the old copper for £3.

Re-examined: If he had understood he would have to pay more than £155 he would have had nothing to do with plaintiff. The boat was a "regular coffin"; he would be glad to sell her for £200.

George Rich, son-in-law of the defendant, owned a cutter called the Mayflower. She was 23¾ tons. He had sailed in the Wildflower. His boat the Mayflower cost him £165 complete. The boat was a better one than the Wildflower. He would not take two Wildflowers for the Mayflower.

Cross-examined: The Mayflower was built by two Swedish carpenters in 1893, and took four months to build. The copper on her cost £45 His boat altogether cost about £550, including copper, sails, and all furnishing.

Re-examined: He thought £155 good pay to the plaintiff for the work done on the Wildflower.

Joseph Fonda, ship's carpenter, said he had examined the Wildflower to see what work had been done by plaintiff. He thought £160 too dear; he would do the work himself in three months for £150. He knew the boat years ago.

Cross-examined: Witness saw the boat last week. He had not seen the keel. He had only seen the boat afloat.

This closed the case for the defence.

Mr. Tredgold having been heard for the plaintiff.

Judgment was given for the defendant with costs.

The Chief Justice: There is considerable conflicting evidence in this case as to the true value of the services done for the defendant by the plaintiff. The plaintiff's witnesses put the value at something like £250, whereas the defendant's witnesses say it was not more than about £150. The plaintiff himself claims as the true value of his services £234, but I am bound to say from the evidence, notwithstanding the evidence of Mr. Robertson and the plaintiff himself, that the true value of the work is not so large as this. But it is unnecessary to decide the point, because the case must be decided on another point. An estimate was given by the plaintiff as to what he would charge for certain work, and the amount fixed in the estimate is £155, and it is quite true certain work was not specified; and if there had been no further communication and no correspondence, I must say there would have been some ground for holding that the plaintiff is entitled to remuneration for work done beyond what appears on the estimates. But the evidence show that the defendant thought the £155 too high, and he wrote to the plaintiff requesting him to reduce the amount. The answer is sufficient evidence as to the defendant understanding that the estimate was to include all the work. "Dear Mr. Riley,—I have gone over the estimate again, and I cannot do it for less," &c. This letter was clear evidence that if there was any additional work to do the plaintiff was to do it for the original charges. That must clearly be what the defendant would understand upon receiving this letter. and I am satisfied from the evidence that if the man had for one moment supposed the work was going to cost more than £155, he would not have had the work done, preferring to buy a new cutter to having the old one patched up. You must believe from the terms of this letter that £155 is final, that all work necessary to be done would be done for £155. That being so. I think that the plaintiff cannot now claim any more. He has already got £5 more in consideration of the work being hurried on, but not because of additional work. Some stress is laid by counsel upon the fact that the defendant's attorney did ask for accounts, from which the inference is that the defendant did not rely upon the estimate—upon the written contract—but would be willing to pay any additional sum as remuneration for additional work, but if the correspondence is read it will be found that the defendant's attorney all along repudiated liability for more than £155. Under all the circumstances—while regretting that the plaintiff should have lost, if he has really lost, I think, on the other hand, it would be still harder for the defendant if he believed the work was to be done for a certain amount to pay the sum of £50 more. One of the plaintiff's own witnesses says that the cutter is worth about £200 now as it stands—practically what the defendant has already paid. He has paid £160 to the plaintiff and £40 (less £3 for old copper sold) for copper. He has paid £197 for a vessel which is worth £200. It would be an injustice, I think, to make him pay any more. There will therefore be judgment for the defendant with costs.

Their lordships concurred.

[Plaintiff's Attorney, W. E. Moore; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

REGINA v. GOLDING. { 1896. June 10th.

Theft — Bailee—Agent — Creditor and Debtor—Account.

The appellant had been employed by the S. Company as their salesman-collector under a written contract which provided that he should be bailee for the company of the books and other property but not of moneys collected, and contained other indications that he was to be an ordinary debtor in respect of such moneys and was to enter them in a debtor and creditor account. He entered the moneys received by him in such account but, on being called upon to pay the same to the company, was unable to do so and was accordingly indicted for theft.

Held, *on a question reserved after conviction, that the facts proved did not justify the conviction.*

This was a question of law reserved for argument for the opinion of the Supreme Court by the Oudtshoorn Circuit Court, as to whether the facts deposed to amount to the crime of theft, on which charge the prisoner was convicted.

Mr. Sheil (Assistant Law Adviser) appeared for the Crown, Mr. Jones for the prisoner Golding.

The prisoner Harry Jos. Golding, "lately a collector-salesman in the employ of the Singer Manufacturing Company," was indicted for theft on ten counts "in that on or about the 3rd day of August, 1895, and at Oudtshoorn, he did receive and take into his possession from Hans Michel, the son of Susan Michel there residing, money amounting to the sum of 12s. 6d. sterling, her property, which said sum or a portion thereof it thereupon and then became and was the duty of the said Golding forthwith to pay to Gustave Schmolie, district manager of the said Singer Joint-stock Company, at Port Elizabeth; that he did not so forthwith pay over any portion, but on the contrary did wrongfully, unlawfully, and fraudulently appropriate and convert the same to his own use and thus did commit the crime of theft." (The other counts were in similar terms.)

The prisoner was found guilty on seven counts, subject to the point of law reserved.

From the evidence it appeared that prisoner was employed by the Singer Manufacturing Company, as a collector-salesman, on a contract under which prisoner undertook to give "such guarantee as shall be satisfactory to them for his honesty and for due performance of the conditions of this agreement." The conditions of the guarantee as given on the back of the contract of agreement included a clause: "If the employed make default in the observance of this agreement the guarantee deposited shall be retained by and forfeited to the employers as part of their damages (but without prejudice to their right to recover more)."

The condition of the agreement itself provided, *inter alia*, that the said Golding should receive 15s. a week salary, payable weekly, and various commissions on moneys collected by him and accounted for to his employers.

Clause 8 of the agreement read as follows: The employed shall be bailee only of the books and property (other than money) of the employers entrusted to him or used by him, and the same shall be delivered up to them forthwith on the termination of the employment.

The prisoner was employed in July, 1895, by the Singer Company to sell sewing machines in Oudtshoorn, George, and Knysna. He sent in on the 3rd August one report showing receipt of five guineas, and for a considerable time sent in no other account. On the manager some weeks afterwards calling for an explanation prisoner (after drawing up an incorrect account) framed a correct account showing an amount of £18 15s. 9d. due to the company by him on sums collected; the books on being produced to the manager were in perfect order; the manager received none of the money and on threatening prisoner with arrest the latter said, "Yes, I know I have embezzled the money.

The course of business was for the prisoner to pay himself out of the sums collected his salary and travelling expenses, the balance to be sent by P.O.O. with his weekly Saturday report to the head office. He never sent a P.O.O. but once sent an I O U for 9s. Various witnesses deposed to paying to prisoner the instalments due to the Singer Manufacturing Company.

Mr. Jones for the prisoner pointed out that the prisoner made no mistake in his counterfoils, his books were well kept, only he did not pay over the balance. *Queen* v. *Jordan* (tried at Oudtshoorn in October, 1891) was on all fours with this. [Reported in "Oudtshoorn Courant" of October 1, 1891.] In that case De Villiers, C.J., appears to have directed the jury to find a verdict of not guilty on the ground that the deficiency was merely a debt. Prisoner's legal position was that he had to collect moneys. He had not to pay them over at once (as the manager's evidence shows) though the indictment says he had to pay over forthwith. He had to deduct his salary, commission, expenses, &c.; therefore till the end of the week when he had to hand over it was not the company's money. It was not as if he had to bank at once. All he had to do was to send P.O.O. and therefore the company were not entitled to the money itself. He had only to account. Once indeed he sent an I O U, which was at all events not returned. It was in the interests of the company that he should be able to use the money collected to push on with his journey. Supposing he only received a small amount at the beginning of a week, he would be entitled to use the money for sustenance and the journey expenses. The 8th clause shows clearly that the prisoner was not to be the bailee of the owner in respect of money. He had to account for a certain amount, but not for all. *Justinian's Digest* (7, 1, 22 and 7) with Pother's note shows that if the money is to be handed over in specie it is theft,

The Chief Justice: Take a collector who does not pay over money to me. The crime is theft by means of embezzlement: the crime charged is theft.

Mr. Jones: The indictment here does not allege that the property was in the company, but in the persons who paid it over. Now the persons who paid it over abandoned it clearly. But the variance as to the ownership is a fatal one (*Archbold* p. 373). Take the one item of Mr. Michel's payments. If the ownership were stated to be in the company the evidence does not justify it. On the analogy of *Queen* v. *Barnes* (10 Cox' Criminal Cases, 255), the property was either in prisoner—or Mrs. Michel—or the company. Act 3 of 1861 shows that if the property is laid in the wrong person the indictment can be amended; if it is not it must stand or fall as it is. The prisoner had the sole control, and it was his till he set it apart—and only t' en did it become the property of the company.

Mr. Sheil: The question here was distinctly a jury question. As to the property being laid in the company—the gist of the indictment offence is not that it was the property of the company or of Mrs. Mitchell—but that he wrongfully, &c., appropriated.

Theft is sufficiently descriptive of embezzling. Theft by embezzlement is often particularised—but not necessarily.

The prisoner had been in the employ of the Singer Company but never paid over a penny—except sen ' an I O U for 9s.

As to clause 8, he was a servant and must have received moneys in that capacity, and if he received money on account he had to account. He never did. The prisoner admits in his own evidence that he owed £18 at a date when he sent in false accounts as owing 9s. only. In whatever capacity prisoner received it he held it in trust, and therefore was bound. As to *Queen* v. *Barnes* the indictment in this case is in the common form. The property is never laid in the person to whom payable. See *Queen* v. *Stewart* (17 Cox, 723).

The Chief Justice said: I have always regarded the 183rd section of the Native Territories' Penal Code as fairly stating the law of the colony proper in regard to thefts by agents. If the terms of the agent's employment are that he is to be an ordinary debtor in respect of moneys received on behalf of the principal and that the personal liability only of the debtor is to be relied upon, then the appropriation by him of moneys so received does not amount to theft, provided that they are properly entered in the debtor and creditor account rendered by him to the principal. In the contract made by the appellant with the Singer Company there are certainly expressions which would lead to the inference that he was intended to be a mere servant, but on reading the whole of the contract I am satisfied that he was intended to be a debtor only in respect of money received for the company, that moneys so received had to form items in a debtor and creditor account, and that the company relied only on his personal liability as debtor. The 8th section stipulates that he is to be bailee only of books and other property of the company, but not of money. If he was not to be the bailee of money received for the company he could only have been intended to be a debtor. The company's object in excepting money probably was to prevent the appellant from escaping liability in case of the loss or theft of the money, but if this personal liability attached to him, whether the money was lost through his negligence or not, he cannot surely be regarded as other than an ordinary debtor for the money. Before he was prosecuted a proper entry had been made by him of the amounts collected, and whatever other criminal offence he may have committed, he could not be convicted of theft. The question reserved must therefore be decided in his favour and the conviction and sentence must be set aside.

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS (Chief Justice), P.C., K.C.M.G., Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

MAGISTRATE'S CASE REVIEWED. } 1896. } June 12th.

Mr. Justice Maasdorp said a case had come before him as judge of the week, in which a man was convicted at Kenhardt of contravening section 4 of Act 3 of 1879 as amended by Act 27 of 1889. The accused was sentenced by the Resident Magistrate to pay a fine of £5 or three months' imprisonment. The Magistrate had exceeded his jurisdiction. He could only impose a fine of £2 or one month's imprisonment, or without the option of a fine sentence to three months' imprisonment. The sentence must be reduced to a fine of £2 or one month's imprisonment.

PROVISIONAL ROLL.

SMIT'S EXECUTORS V. CARSTEN AND OTHERS.

Mr. Graham applied for provisional judgment on a mortgage bond of £400 with interest from February 1, 1891, and that the property be declared executable.

Granted.

OLIVIER V. STEYN.

Mr. Smuts applied for a revival of provisional sentence granted on February 1, 1882, on a mortgage bond, and that certain property not specially hypothecated be declared executable.

The Court ordered judgment to be revived, but made no order as to the immovable property.

HEWETSON AND CO. V. SOLMS.

Mr. Close applied for provisional judgment on a promissory note for £126 7s. 2d., less £26 7s. received on account.

Granted.

ZOER'S EXECUTORS V. COLYN.

Mr. Buchanan applied for provisional judgment on a promissory note for £175 7s. 10½d. and interest, and costs of attachment.

Granted.

MURPHY V. NESER.

Mr. Smuts applied for provisional judgment on a cheque for £71 1s. 3d., and interest from the date of summons.

Granted.

THE EQUITABLE FIRE INSURANCE COMPANY V. COETZE.

Mr. Jones applied for provisional judgment on mortgage bonds for £200 and £700 with interest from July 1, 1895, and on a mortgage bond of £2·0 with interest from June 17, 1895, and that the property specially hypothecated be declared executable.

Granted.

TRUSTEES OF THE DIOCESE OF CAPE TOWN V. KRUGER'S EXECUTORS.

Mr. Smuts applied for provisional sentence on a mortgage bond of £750 with interest from January 1, 1895, also that the property not specially hypothecated be declared executable.

Granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. MADUMASHE.

Mr. Sheil applied for judgment under rule 329D in terms of the summons.

Granted.

COLONIAL GOVERNMENT V. RAILTON.

Mr. Sheil applied for judgment under rule 329D on a sum of £10, less £5 paid on account.

Granted.

HEADLEY BROS. V. J. POWER AND CO.

Entry of appearance—Withdrawal of attorney—Rule 329D.

Mr. Benjamin applied for judgment under rule 329. The attorneys, Messrs. Findlay & Tait, had withdrawn from the case, and there was no place for service of process. Defendant had left the Colony, so personal service could not be effected. Counsel argued that the withdrawal of the attorney is tantamount to withdrawal of entry of appearance (*Chitty's Practice*, p. 254); for not only must the name be given to enter appearance but the place for service also.

Mr. C. C. Silberbauer said that when Mr. Power went to England he left him his general power of attorney, but stated that Messrs. Findlay & Tait had already been instructed to defend this action, and were to go on with it.

Mr. Findlay stated that Mr. Power went to England on May 20 without leaving any instructions in the matter. Therefore his firm withdrew from the case.

The Court ordered all future notices to be served on Mr. Silberbauer and declined to grant judgment, as rule 329 is for defendants who have *not* entered appearance. On the attorney's withdrawal he should have stated where process could be served. Costs of this application not granted.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

REHABILITATIONS.

Re JAMES KINGSTON CUTHBERT. { 1896. June 12th.

Mr. Buchanan applied for the rehabilitation of James Kingston Cuthbert.

Mr. Watermeyer appeared to oppose the application on behalf of one of the largest creditors, Messrs. Thesen & Co., timber merchants, Knysna.

After argument, the application was refused.

The Chief Justice: Considering all the facts of the case I think the creditors were justified in opposing the rehabilitation. It has been proved that the debtor's occupation—that of a woodcutter—was not such as to require elaborate books, still some accounts might have been forthcoming, The property—which he must have known was valued for Divisional Council purposes at only £10—he valued at £80. It is true there was an independent valuator, but we all know how these "independent" valuators are got at. The petition for voluntary surrender came before me. If I had known that this property was only worth £30, or even £50, I would not have granted the order. The valuation was evidently made with the object of inducing the judge to accept the surrender. He also promised to pass a bond, but afterwards refused to do so. He also denied his signature, and afterwards confessed judgment. The transactions with his sister were also somewhat suspicious. It was said there ought to be an action for undue preference, but we do not know the position of the sister; whether she could pay costs. On the whole I think the application ought to be refused with costs of opposition, and leave given to apply again in three months.

Their lordships concurred.

Ex parte JOHANNES LODEWYK STEYN.

Mr. Maskew applied for the rehabilitation of Johannes Lodewyk Steyn.

The Court stated that the trustee evidently wished to oppose the application, and had filed an affidavit, having only just heard of the application.

Mr. Maskew asked that the matter be allowed to stand over.

The Court ordered the application to be postponed to 13th July; notice to be given to the trustee.

Ex parte CHAS. FREDERICK JONES.

Mr. Maskew applied for the rehabilitation of Chas. Frederick Jones.

Granted.

Ex parte JACOBUS LODEWICUS MEYBURGH.

Mr. Buchanan applied for the rehabilitation of Jacobus Lodewicus Meyburgh.

Granted.

Ex parte RICHARD DAWSON JENNER.

Mr. Buchanan applied for the rehabilitation of Richard Dawson Jenner.

Refused, with leave to apply again in three months.

GENERAL MOTIONS.

PIRIE V. PIRIE.

This was a personal application by Mrs. Pirie to be allowed to sue *in forma pauperis* in an action for divorce against her husband. She stated that her husband had left her six years ago and gone to Mashonaland. She was a dressmaker earning 16s. a week and had two children. She was afraid her husband might claim the children.

The Court, under the special circumstances, referred the application to counsel and asked Mr. Close to take the reference.

SMITH V. SMITH.

Mr. Graham applied for leave to applicant to sue by edictal citation in an action against her husband for divorce by reason of his alleged adultery, and for the forfeiture by him of his share of property under their marriage in community.

The application was granted, with leave to serve the intendit and notice of trial with the citation; citation returnable on the 6th of August next.

VAN WYK V. MAGISTRATE OF WILLOWMORE. } 1896. June 12th.

Magistrate's Court—Periodical Court—Agent—Attorney—Practice—Act 43 of 85, section 8.

Where there are two attorneys in practice in any district, one of them practising at the ordinary place for the holding of the Magistrate's Court of such district and the other practising in a Periodical Court of such district, the 8th section of Act 43 *of* 1885 *prevents the further admission of agents, even although a portion of an adjoining district has been defined, under section* 10 *of Act No.* 16 *of* 1882, *as an area over which the Magistrate, holding such Periodical Court, shall exercise jurisdiction.*

Mr. Searle, Q.C., applied for an order requiring the respondent to enrol applicant as an agent of the said Court in terms of section 36 of Act 20 of 1856.

Mr. Sheil (Assistant Law Adviser) appeared for the Resident Magistrate to submit to the judgment of the Court.

The affidavit of Johannes Jacobus van Wyk, of Willowmore, the applicant, was as follows:

1. That on the 23rd day of April, 1896, I applied to the Resident Magistrate of Willowmore to be enrolled as an agent of his Court, but he refused to enrol me on the ground that there are two attorneys of the Supreme Court residing and practising in the division of Willowmore.

2. That although there are two attorneys residing and practising in the division of Willowmore, there is only one attorney, who practises in the Court of the Resident Magistrate at Willowmore, the other attorney resides and practises at Steytlerville, which is a village on the boundary of the divisions of Willowmore and Uitenhage, and situated partly in one division and partly in the other, and which has a separate court presided over by an Assistant Resident Magistrate.

3. That Steytlerville is 56 miles from Willowmore.

4. That there are four enrolled agents residing and practising at Willowmore.

5. That I am managing the business of Thomas Henry Matthews, an enrolled agent in the Magistrate's Court of Willowmore, who left recently on a visit to England, and his business will suffer considerably and has already suffered through the refusal of the respondent to enrol me.

The following were the Resident Magistrate's reasons:

1. Section 8 of Act No. 43 of 1885 reads thus: "From and after the taking effect of this Act no person in any district where not less than two attorneys are in practice shall be admitted and enrolled as an agent in the Court of any Resident Magistrate . . . . ."

2. For the purposes of the above section the district and division of Willowmore are identical in size, shape and boundary.

3. The whole of the village of Steytlerville, including the limits of its municipality, is situate within the boundary of the district of Willowmore and is about 60 miles from the township of Willowmore.

4. There is one registered attorney in practice in Steytlerville; and there is one registered attorney in practice in the township of Willowmore, consequently there are two attorneys in practice in the district of Willowmore.

5. Supposing these two attorneys were residing and in practice in Steytlerville could the applicant be enrolled in the township of Willowmore; or *vice versa*, if these two attorneys were residing and practising in the township of Willowmore could the applicant be enrolled at Steytlerville? I hold he could not.

6. The applicant's affidavit is wrong. Steytlerville is not partly in one division and partly in another. And although the Assistant Resident Magistrate of Steytlerville has an area over which he exercises judicial jurisdiction, yet the whole of the district of Willowmore, including that part in this district over which he has jurisdiction, is under the immediate control of the Resident Magistrate of Willowmore.

7. The Assistant Resident Magistrate has not the power to enrol agents.

8. No Resident Magistrate has or should have the power to place any interpretation on any section of any law other than the section conveys. If any section of the law requires interpretation let it be done by the highest authority, and let such interpretation stand once and for all until altered or cancelled by the Legislature.

9. I have personally no objection to the enrolment of applicant. He is a steady and straightforward young man, and deserves every encouragement, but under the circumstances above stated I am of opinion that section 8 of Act 43 of 1885 prohibited his enrolment in this district.

Mr. Searle for the applicant referred to Proclamation and notice of 10th January, 1894, as to Acting Resident Magistrate appointment, and section 8; Act 43 of 1885. The Acting Resident Magistrate has jurisdiction in Steytlerville, which is partly in Willowmore, partly in district of Uitenhage. This practically makes the Assistant Resident Magistrate's Court a different court. A separate area has been formed out of two districts though he is under the Resident Magistrate, Willowmore, section 3 of Act 20 of 1856 providing that the Governor may define the areas or districts for the jurisdiction of the Resident Magistrate.

The Chief Justice: Will admission at Willowmore entitle him to practise at Steytlerville?

Mr. Searle: I think it would. But if Assistant Resident Magistrate, Steytlerville, admit him he cannot practise at Willowmore. The Assistant Resident Magistrate can admit him, see section 3 of Act 16 of 1882 which gives an Assistant Resident Magistrate all powers of Resident Magistrate.

The Chief Justice: If a person is charged at Steytlerville how is he charged "in the Periodical Court of Steytlerville" or of Willowmore?

Mr. Searle: Apparently "Periodical Court, Steytlerville."

Mr. Sheil: From section 10, Act 16 of 1882, it is clear that the Steytlerville Court is a Periodical Court and merely ansillary to Willowmore. There is nothing to oust the jurisdiction of the Resident Magistrate of the district.

The Chief Justice: There might be concurrent jurisdiction, as, *e.g.*, in Cape Town the Resident Magistrate has two Assistant Resident Magistrates under him.

Mr. Searle: The Willowmore case somewhat differs, part of the area of Steytlervillle is in Uitenhage.

The Chief Justice said: The object of the Legislature in passing the 8th section of Act 43 of 1885 is perfectly clear. The object aimed at was, without affecting vested interests, gradually to substitute attorneys as practitioners in the Magistrates' Courts. Taking the words of the section in their literal sense, the fact that two or more attorneys are in practice in any district would be sufficient to prevent any person from being admitted and enrolled as an agent in the Resident Magistrate's Court of that district. But it is said, that the section should be so construed as to exclude the admission of agents only where two or more attorneys practise in the Magistrate's Court of the district. The applicant admits that there are two attorneys in the district of Willowmore, but he contends that the section is not applicable because one of the attorneys is in practice at Willowmore and the other at Steytlerville. He further admits that although under the 10th section of Act No. 16 of 1882, the jurisdiction of the Willowmore Magistrate holding Periodical Court at Steytlerville has been extended over an adjoining area of the district of Uitenhage, the Periodical Court itself is held within the district of Willowmore. It is in fact the Court of the Resident Magistrate of Willowmore held at Steytlerville. Under Act 9 of 1857 the Magistrate of any district holding Periodical Court within such district does so as the Magistrate of that district, and the Periodical Court is a Magistrate's Court of the district held elsewhere than at the stated and ordinary place for the holding of the Magistrate's Court. It is clear, therefore, that an attorney practising in the Steytlerville Periodical Court must be regarded as an attorney practising in the Court of the Resident Magistrate of Willowmore. There being two attorneys in practice in such Court the Magistrate properly refused to admit and enrol the applicant as an agent and the application to compel the Magistrate to enrol him must be refused.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Reid & Nephew.]

THE PAARL FRUIT PRESERVING COMPANY.

Mr. Graham presented the second and final report of the official liquidators; and applied also for the sanction of the Court to the appointment of Mr. V. A. van der Byl as attorney to the said liquidators during the absence from the Colony of Mr. C. C. de Villiers.

Granted. The report to lie for inspection; after which the usual order would be made.

IN THE INSOLVENT ESTATE OF JEAN LESPADE.

Mr. Benjamin applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for transfer to the said estate of certain lot of ground, No. 28, situated outside the Garrison limits, in the vicinity of Port Elizabeth, purchased by the said Lespade in 1875, but never transferred.

Granted.

THE PETITION OF EDMUND H. LEVI AND WIFE. } 1896. June 12th.

Post-nuptial contract—Marriage in community.

A. *and* B. *were married in Germany without drawing up an ante-nuptial contract.* A. *the husband was born in England but settled in the Cape Colony;* B. *the wife was born in the Colony but resided in Germany.*

On returning to the Colony after the marriage it was discovered that a sum of £1,000 *with interest* (*of which* A. *and* B. *were previously unaware*) *had become due to* B.

An order of Court was asked for authorising the parties to effect a post nuptial contract having the force of an ante-nuptial.

The Court *refused to grant the order.*

Mr. Tredgold applied for leave to petitioners to enter into a contract having the effect of an ante-nuptial contract, with a view of settling upon the second petitioner certain sum of money invested on her account by her father, of which she was unaware at the time of her marriage, and also certain life policy and wedding presents.

The petition of Edmund Harry Levi and Johanna Augusta Levi (born Gers) set forth:

That your petitioners are at present resident at Griquatown in the district of Hay.

That your petitioner Edmund Harry Levi was born in England, and came out in 1887 to this Colony, where he since has resided in different parts of Griqualand West.

That your petitioner Johanna Augusta Levi (born Gers) was born at Hope Town in this

colony, and left for Europe in 1889, since which time she has remained in Europe with her parents.

That Edmund Harry Levi left this colony in January last for a trip to Europe, and when there was married to Johanna Augusta Levi (born Gers) on the 8th April, 1896, at Cottbus in Germany, according to the laws and customs of Germany, before a Registrar of Marriages, as will appear from the certificate hereunto annexed marked "A."

That your petitioners were both majors at the time of marriage.

That on your petitioners, arrival at Hope Town in the Colony on the 10th May, 1896, they were informed by Lilienfield Bros., of Hope Town, that there was a sum of one thousand pounds with interest thereon, due and payable to your petitioner Johanna Augusta Levi (born Gers), which amount has been invested by her father Julius Gers for her account, and which amount the said Lilienfeld Bros. wished to pay to your petitioners, and your petitioners refused to accept the same until a post-nuptial contract had been entered into. That at the time of marriage your petitioners were not aware that there was any money due to your petitioner Johanna Augusta Levi (born Gers) and only became acquainted with the fact on their arrival at Hope Town.

That immediately after your petitioners' arrival at Griquatown on the 14th day of May, 1896, they consulted their attorney with the view to having a post-nuptial contract entered into, whereby the said one thousand pounds may remain the property, or be settled upon, your petitioner Johanna Augusta Levi (born Gers).

That both parents of the said Johanna Augusta Levi (born Gers) are still alive.

That your petitioners are desirous of entering into a post-nuptial contract whereby certain life policies on the life of your petitioner Edmund Harry Levi for £1,000, and accumulations thereon, as also the wedding presents, may be settled on his wife the said Johanna Augusta Levi (born Gers).

Wherefore your petitioners pray that this Honourable Court may be pleased to grant an order enabling your petitioners to appear before a notary public of this Honourable Court, and enter into a post-nuptial contract whereby the aforesaid sum of £1,000 with interest thereon may remain the property of or be settled upon your petitioner Johanna Augusta Levi (born Gers), and whereby the said life policies and wedding presents may be settled upon her, the said post-nuptial contract also to exclude community of goods, profits, inheritances, legacies, gifts or bequests accruing to, or losses happening to your petitioners respectively, or grant such relief as to this Honourable Court may seem meet.

The order was not granted.

The Chief Justice said: In many cases these contracts are not reduced to writing until after marriage. It has been ordered in cases where the contracts were made before marriage that they might be registered afterwards. The applicant, however, wishes an agreement really made after marriage to be turned into an agreement made before marriage. I don't think the Court can call that an antenuptial contract, and have it registered as such. There will be no order.

[Applicant's Attorney, Gus. Trollip.]

MYBURGH V. REGISTRAR OF DEEDS. { 1896. June 16th.

Will—Power of appointment—*Fidei-commissum*—Transfer Duty Act—Exemption—Act 5 of 1884, section 19 sub-section 12.

Where a testator has conferred on a person to whom he has given a limited interest in property, the power of selecting the person on whom such property should devolve at the expiration of such limited interest, the due exercise of such power has the same effect as if the testator had himself made the selection in the will.

A *testator by will directed that his daughter should have the income for life of certain funds, and that after her death such funds should devolve upon such child or such of her children in such shares and in such manner as she should by deed or will appoint. He further directed that certain land of his should be preserved in his family as long as possible and should be retained as part of the funds, with liberty, however, to the trustees of the funds to sell the land, if expedient, but only with the consent of his daughter. After his death she apportioned the funds among her daughters and allotted to her son* A. *the residue of the funds, which included the land which was still unsold. The executors of the testator being about to transfer the land to* A.;

Held that *he was exempt from the payment of transfer duty as being a descendant*

within the fourth degree of the testator and claiming free property in remainder after the expiration of a previous fidei-commissum, *or other similar limited interest, in terms of sub-section* 12, *section* 19 *of Act* 5 *of* 1884.

Mr. Searle, Q.C., applied for an order declaring that applicant is entitled to obtain transfer of certain landed property situated in Adderley-street in the occupation of J. D. Cartwright & Co., free of transfer duty, he being a person claiming exemption under Act 5 of 1884 on free property in remainder after the expiration or extinction of a limited interest.

Mr. Sheil appeared for the Registrar of Deeds to oppose the application.

The petitioner set forth:

1. That the late Alexander MacDonald, grandfather of your petitioner, was in his lifetime owner of certain landed property at the corner of Adderley and Darling-streets, Cape Town, now in the occupation of Messrs. J. D. Cartwright & Co.

2. That the late Alexander MacDonald by his last will and testament, certified copy whereof is duly filed in the office of the Master, and copy whereof is hereunto annexed marked "A," expressed the wish that the said property should be preserved in his family as long as possible and therefore directed that such house, stores, and premises should be retained as part of the Myburgh Funds in the said will mentioned.

3. That after making certain other provisions the said Alexander MacDonald directed that the trustees under the will should stand possessed of the residue of his trust funds upon trust to retain such parts as might consist of investments, or at their discretion to sell the same and invest the moneys arising therefrom and vary such investments, and upon the further trust to pay the annual income of such residue in the will stated to be thereinafter called the "Myburgh Funds," to one Anna Myburgh, daughter of the said Alexander MacDonald and mother of your petitioner, during her life; and the trustees were further in the said will directed after the death of the said Anna Myburgh to hold the said "Myburgh Funds" and the income thereof in trust for such child or children of the said Anna Myburgh, and if more than one in such shares and in such manner in all respects as the said Anna Myburgh should (whether covert or sole) by deed or will or codicil appoint, and in default of any and subject to every such appointment upon other trusts not necessary to mention herein,

4. That your petitioner's mother the said Anna Myburgh died on the 21st day of November, 1894, leaving a will, duly certified copy whereof is filed in the office of the Master and a copy thereof hereunto annexed marked B.

5. That in her will the said Anna Myburgh recited the terms of the will of the said Alexander MacDonald referred to in clause 3 of this petition and declared that by deed poll bearing date the 17th May, 1894, she had appointed that the sum of £30,000 should be a charge upon and raisable out of the "Myburgh Funds," and be held in trust for her daughter Francis Anna MacDonald Harrison absolutely, and that by deed poll of the same date she had made a similar appointment of £30,000 out of the "Myburgh Funds" in favour of her daughter Jeanie Hilda MacDonald Curtis, and then after directing the trustees of the "Myburgh Funds" to raise or set apart and appropriate the sum of £30,000 in trust for her daughter Evelyn MacDonald Myburgh, in certain eventualities specially directed and appointed that the MacDonald trustees should subject to the appointments above referred to stand possessed of the "Myburgh Funds" and the income thereof upon trust for the petitioner absolutely.

6. That the three several sums of £30,000 each have been duly paid to your petitioner's sisters and your petitioner is entitled to the residue of the "Myburgh Funds," which include the landed property aforesaid.

7. The said Alexander MacDonald and Anna Myburgh were each of them at the time of their decease domiciled in England, as are now the trustees acting under the will of the late Alexander MacDonald.

8. Owing to the said trustees being so domiciled they, as I am informed, were instrumental in obtaining the appointment of the Board of Executors as executors dative of the said MacDonald's will in the Colony.

9. At the request of the said trustees and at the request of your petitioner, the Board of Executors are prepared to transfer to your petitioner the said landed property and a deed of transfer, copy whereof is hereunto annexed marked "C." was lodged for registration, and at the time of such lodgment your petitioner's attorneys claimed for him exemption from the payment of transfer duty under the provisions of sub-section 12 of section 19 of Act 5 of 1884 as a person claiming free property in remainder after the expiration or extinction of a limited interest."

10. The Registrar of Deeds has declined to register the said deed as a valid transfer and holds;

(*a*) That the property as forming part of the trust should be transferred to the trustees subject to the conditions of the will.

(*b*) That transfer duty is payable by your petitioner, the Registrar stating that the property was not in itself subject to any *fidei-commissum*, that it formed part of the trust, but might have been sold at any time upon certain consents being obtained, and that there was no absolute condition that it should devolve upon any descendant.

Wherefore your petitioner prays that your Honourable Court may be pleased to grant an order declaring that so far as the Registrar of Deeds is concerned, and subject to other formalities required by the Deeds Office being duly complied with, he is entitled to receive transfer from the said executors dative of the said landed property free from payment of transfer duty, or that your Honourable Court may grant such order as to them may seem meet in the premises.

The following were the relevant portions of the will:

"I direct that my trustees or trustee shall stand possessed of the residue of my trust funds including any funds appropriated to meet the annuity to my said wife, but subject to such annuity upon trust to retain such parts as may consist of investments or at their, her, or his discretion to sell the same and invest the moneys arising in or upon any of the investments hereintofore mentioned and vary the same from time to time and shall pay the income of such residue (hereinafter called the 'Myburgh Funds') to the said Anna Myburgh during her life but during her coverture for her separate use without power of anticipation and after her death shall hold the same funds and the income thereof in trust for such child or children of the said Anna Myburgh, and if more than one in such shares and in such manner in all respects as the said Anna Myburgh shall (whether covert or sole) by deed or will or codicil appoint, and in default of any and subject to every such appointment in trust for such child or children of the said Anna Myburgh as being male shall attain the age of twenty-one years, or being female shall attain that age or marry, and if more than one in equal shares, but no child of the said Anna Myburgh shall take a vested and transmissible interest under any appointment in pursuance of the power hereinbefore given to the said Anna Myburgh till such child being male shall attain the age of twenty-one years, or being female shall attain that age or marry, and no child who shall take any part of the 'Myburgh Funds' under any such appointment as aforesaid shall take any part of any unappointed portion of the same funds without bringing his or her appointed part into hotchpot."

"But I declare that from my death the unsold real estate and outstanding personal estate shall be subject to the trusts (above) declared concerning the net moneys to arise from my real and residuary personal estate, or the investments representing the same (hereinafter called my trust fund), and the rents, interest and yearly produce of such unsold real estate and residuary personal estate shall be deemed annual income for the purposes of such trusts and such unsold real estate shall be transmissible as personal estate and be considered as converted in equity."

"Nevertheless it is my wish that my house, stores and premises situate at the corner of Adderley and Darling-streets in Cape Town, in Block K, and more particularly described in the deed of transfer made in my favour on the ninth of November, one thousand eight hundred and thirty-seven, should be preserved in my family as long as possible in testimony of the affection and respect due to my late father, and I therefore direct that such house, stores and premises shall be retained as part of the 'Myburgh Funds' hereinafter mentioned, and I empower my trustees or trustee to pay and discharge out of the rents and profits of the same house, stores and premises, or out of the other income of the 'Myburgh Funds' all such costs and charges of putting and keeping the same in repair as may from time to time be necessary. And I declare it to be my earnest wish and recommendation, that such house, stores and premises at Cape Town shall not be sold, unless and until in the judgment and discretion of my trustees or trustee it shall be requisite for the purposes of administering the 'Myburgh Funds,' or specially desirable or expedient with a view to the interest and advantage of the person or persons entitled to or interested in the "Myburgh Funds" that such sale should take place, but in no case shall any such sale take place during the life of my said daughter Anna Myburgh without her consent in writing, or after her death during the life of my daughter Jane Margaret Bonham Carter, wife of Lieutenant Colonel Hughs Bonham Carter, without her consent in writing, but no purchaser of the said house, stores and premises at Cape Town shall be affected by any of the directions hereinbefore contained, concerning the same, other than that making the consent of the said Anna Myburgh."

The Registrar of Deeds reported as follows

"With regard to the objection made by me to the effect that the property should be registered

in the names of the trustees appointed under the will of the late Alexander MacDonald and by them transferred to the applicant, I have to state for your information that I considered this course should be adopted owing to the fact that the property was vested in the trustees under the will; that although the same persons were appointed executors they had distinct instructions as to the administration of the trust; that the property was apparently controlled by them in all ways and that it had to pass from their control into the hands of the applicant, in terms of the will of his mother, who was authorised under the trust to direct by deed or will the manner in which the trust estate should be distributed amongst her children. I am not aware that there is any precedent for adopting this course, and had the deed been otherwise in order for execution I am not sure that I would have insisted upon the rule being complied with; but it would be as well seeing that the application must come before the Court in the question of exemption, to obtain the Court's ruling on the point raised.

"As to the objection to register the transfer on the grounds that transfer duty should be paid, I may state that I am prepared to admit that the applicant, as a person who would be an heir *ab intestato* had MacDonald died intestate, is entitled to claim exemption under sub-section 3, section 19 of Act 19 of 1884, but not total exemption under sub-section 12. In that section I consider provision is made for those cases only in which a property is in distinct terms burdened with the entail of *fidei-commissum* or other similar limited interest, after the expiration or extinction whereof the remainder man if a descendant within the fourth degree may claim its privileges.

"Had the property been so divided under the will of MacDonald that it was to devolve upon the applicant, I would have had no hesitation in registering transfer without duty, but seeing the property might have been sold subject to certain consents being obtained, that there is absolutely no provision as to the ultimate disposal in MacDonald's will, and that it was acquired by the applicant as part of the residue of the trust estate under his mother's will, she being as before stated authorised to distribute such estate, I did not consider that it is a property burdened with a limited interest in the meaning of the sub-section.

"(Signed) B. H. HOLLAND,
"Registrar of Deeds."

Mr. Searle, Q.C., for the applicants, said that the Registrar of Deeds now wants to bring the case under Act 5 of 1884, sub-sections 2 and 3 of section 19, though sub-section 2 does not apply here, for it refers only to cases of purchase. From sub-sections 8 and 9 it is clear that the principle of the law is to deal leniently with persons who would be the lineal descendants of the testator. This case should fall either under section 12 or section 2. Whichever of the two sections does apply the applicant should be able to transfer free of duty. The power-of-attorney tendered was the correct power-of-attorney to be used.

Mr. Sheil: The Registrar of Deeds says there is no precedent for passing such a transfer. The matter depends on whether a *fidei-commissum* was constituted by Alex Myburgh's will: for there is nothing directly bearing on the Adderley-street premises in the will except the one clause "to be kept in the family as long as possible." In **Carey's case* (4 Sheil 129) there was a similar clause, but there also the specific clause being doubtful the Court would not take it as *fidei-commissum*. *Van Leeuwen* (Comm. Bk. 3, c. 8, section 17) says that if any one is instituted as heir to the usufruct where no one is mentioned as heir to the ownership it is a case of *fidei-commissum*. No *fidei-commissum* is created unless a definite person is named as heir (*Castleman* v. *Strides Executors*, 4 J., 28). The legacy bequest therefore gave an absolute interest in the property to Mrs. Myburgh if the Court held that this was not a fidei-commissary bequest. The only point is whether a *fidei-commissum* or usufruct was created for Mrs. Myburgh.

Mr. Searle: If the ownership did vest in Mrs. Myburgh then clearly she should have had it transferred to her. But neither she nor Registrar of Deeds nor executors take up that position.

The Chief Justice: Even if you take the 8th section and Mrs. MacDonald exercised her power of appointing only one child, should he not be exempt only on his *pro rata* share or should be exempt on all?

C.A.V.

Postea (June 16th).

The Chief Justice gave judgment in this case as follows: The view which I expressed during the arguments in this case is fully supported by the authorities which I have since consulted. Where a testator has conferred on a person, to whom he has bequeathed a limited interest in property, the power of selecting the persons on whom such property shall devolve at the expiration of such limited interest, the due exercise of such power has the same effect as if the testator had himself made the selection in the

* 11 Juta, 123.

will. I am not aware that any cases relating to the exercise of such powers have ever arisen in this Court, but the practice of conferring such powers on fiduciary heirs and legatees was a common one under the Roman as well as the Dutch law. In support of the proposition which I have stated, I need only refer to *Digest*, xxxi., 67, and the *Dutch Consultations*, Vol. i., Cons. 165. In the present case the testator, by will, expressed the wish that the land now in question, at the corner of Adderley and Darling-streets, should be preserved in his family as long as possible, and directed that it should be retained as part of the "Myburgh Funds" created by the will, with liberty, however, to the trustees of the funds to sell the land if they should find it expedient so to do, but then only with the consent of Mrs. Myburgh, to whom the income of the whole of the funds was given during her life. The testator further directed that after her death the funds sh uld devolve on such child or children of Mrs. Myburgh and, if more than one, in such shares and in such manner in all respects as she should by deed or will or codicil appoint. After the testator's death Mrs. Myburgh by will apportioned the funds among her daughters, and directed that, subject to such apportionment, the trustees should stand possessed of the Myburgh funds, and the income thereof upon trust for her son Alexander absolutely. The and in question was not sold, and the executors of the testator's estate now propose to transfer it to Alexander Myburgh, as being part of the Myburgh funds allotted to him under Mrs. Myburgh's appointment. No objection is raised by anyone to the transfer, but the Registrar of Deeds claims transfer duty, whilst Alexander Myburgh maintains that he is exempt from duty as being a descendant of the testator, claiming free property in remainder after the expiration of a previous *fidei-commissum* or other similar limited interest in terms of sub-section 12, section 19 of Act 5 of 1884. Now, reading the will as if it had directed that the land in question, if unsold at the time of Mrs. Myburgh's death, should form part of the share of the Myburgh funds allotted to the petitioner, the question arises whether it created a "*fidei-commissum* or other similar limited interest" in respect of the land. The only argument against the creation of such an interest is afforded by the circumstance that the trustees of the fund were authorised to sell the land if necessary or expedient. It may be said that as there can be no *fidei commissum* where it is left to the appointment discretion of the person having the power of whether he shall appoint anyone or not (*Voet*, 36, 1, 29), it ought equally to follow that if such person has the power of selling the property there can be no *fidei-commissum*. But Mrs. Myburgh had no power of selling the land. The trustees of the funds could sell the land after obtaining her consent, but they were bound to pay the proceeds of any sale into the Myburgh funds. The circumstance that the trustees had the power of sale, had the effect of making the *fidei-commissum* conditional upon the land not being sold by trustees before Mrs. Myburgh's death, but it in no way extended her power over the land. She had only a limited interest in it, and the only matter left to her discretion was the distribution of the funds among her, children. When, in the exercise of this power, she selected the petitioner as the person to whom the still unsold land should be awarded, he became the person to whom the testator must be deemed to have bequeathed the land, subject to Mrs. Myburgh's previous limited interest. The prayer of the petitioner must therefore be granted. The Registrar of Deeds was quite justified in raising the question, which was one that has never been raised before. His objection was that he thought the transfer in the first instance should have been to the trustees, and then from the trustees to the petitioner, but if the proposition which has been mentioned holds good then it would equally hold good in regard to the transfer. If this exercise of power was considered to have been such as the testator himself possessed, then the executors of the testator should make the transfer after the expiration of the period of limited interest. But we think that there should be no order as to costs in this case.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS (Chief Justice), Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

IN THE MATTER OF THE MINORS YATES. } 1896. June 16th.

Mr. Buchanan applied for authority to the father of the said minors to pass mortgage bonds in terms of the conditions of sale and of Act No. 15 of 1887, to secure the balance of the

purchase price of certain two farms known as Anstey and Stretton, in the district of Mount Fletcher, bought by him from Government for the benefit of his said minor children.

Granted.

IN THE INSOLVENT ESTATE OF THE LATE HENRY WATKINSON.

Mr. Buchanan applied for a further period of six months, within which the trustee of the said estate shall be allowed to file his third account by reason of his inability to dispose of certain farm called Louthe Park, the property of the estate, situated in the district of Matatiele.

Granted.

IN THE MATTER OF THE MINOR ROBINSON.

Mr. Tredgold applied for authority for the transfer to the said minor, together with transfer to his married sister, of an undivided half-share to each in certain farms, known as Notcliffe Park, and to apply funds belonging to the minor to paying off his half-share of the mortgage bond thereon, and to advance the other half-share to his sister.

Granted.

IN THE ESTATE OF THE LATE SAMUEL COX.

Mr. Watermeyer applied for authority to the executors to build a cottage on part of the landed property of the said estate to serve as a residence for the surviving spouse, who has a life interest therein, and to raise the necessary funds for such buildings and attendant costs on mortgage of the land in question.

Granted.

WILSON V. BAKER.

Mr. Close applied for an interdict restraining the transfer or alienation of the respondent's interest in the Globe Diamond-mining Syndicate (Limited), pending the result of an action about to be instituted against him by applicant for the recovery of damages for breach of contract, and refund of money and salary due.

The application was not granted, the petition not alleging sufficient grounds therefor.

IN THE MATTER OF THE MINOR VAN AS.

Mr. Searle, Q.C., applied for authority to the father and natural guardian of the said minor to institute an action against one Jacobus J. Nel for the recovery of a sum of money received by him as a donation to the minor from her grandmother for payment into the Guardians' Fund, but not so handed in by him.

Granted.

IN THE ESTATE OF THE LATE FAKEER.

Mr. Graham applied for authority to the executors testamentary to sell certain house, situated between Pepper and Bloem streets, Cape Town, bequeathed by the said Fakeer to certain of his descendants and others, the property being in a state of ill-repair and no longer suitable for the joint occupation mentioned in the will.

Order granted, subject to the approval of the Master, the price not to be less than £575, and minor's costs to come out of the estate.

REGINA V. VAN DER WESTHUIZEN.

Theft—Ostrich feathers—Expert evidence.

This was an appeal from the conviction of the accused, before the Resident Magistrate of Oudtshoorn, under Act 35 of 1893, on a charge of theft of two ostrich feathers belonging to Mr. Fourie.

Mr. Graham apppeared for the appellant.

Mr. Sheil (Assistant Law Adviser) appeared for the Crown.

The Magistrate gave as his reasons that he found the following facts proved: Five feathers were stolen from the right wing of Fourie's cock ostrich, and two right wing feathers of a very superior quality were proved to have been purchased from the accused. Complainant's bird was a very superior bird, and the two feathers alleged to have been stolen were compared with others from the left wing of the bird, and expert evidence was led to show that all the feathers were from the same bird. The defendant was convicted of having been in unlawful possession, and unable to give a satisfactory account of how he came into possession of the feathers.

After argument,

The Chief Justice said: In this case the Court has not to judge so much on the credibility of witnesses, as on the amount of weight which is to be given to expert evidence. The conviction in this case depends entirely upon the evidence of experts, who say that the two feathers, which undoubtedly were sold by the prisoner, came from the same bird as the three other feathers which were picked by the witnesses for the prosecution. If this evidence is correct the prisoner is guilty, but I must say that I look with very great doubt upon such evidence. The experts say that in their opinion the feathers must have come from the same bird, but they do not give those explanations which, in my opinion, ought to have accompanied that evidence. If they had detailed the features by which it could be proved that all those feathers came from the same bird, the Court would have closely examined those feathers in order to state

whether they were correct or not. But they do not. They simply state that they are satisfied that the feathers came from the same bird. It seems a strange circumstance in this case that if the prisoner did, as charged, steal these two feathers that the three other featners, which must have been stolen at the same time, were not traced to his possession. If he had stolen the five feathers, as he must have done if he had stolen the two, there is no explanation as to why only two feathers were found in his possession, and why he sold those two feathers separately. Several witnesses were called to say that they saw the prisoner carrying two feathers in his hand. He was carrying them in the public road, and there are no witnesses to say that they saw prisoner in possession of five feathers. Therefore the only other explanation can be that there were two thieves—one who stole two feathers on the right wing, and another who stole three other feathers from the right wing, and both left the left wing untouched. It is such an extremely improbable circumstance that two persons should have stolen feathers from the same bird and both only touched one wing, and left five good feathers in the other wing. The prisoner's brother stated, and the Magistrate does not say that he disbelieves him, that on April 30 he had been plucking feathers from his birds, and the prisoner was assisting him, and that he allowed prisoner to select two of the best of the feathers for the trouble he had in assisting. Still the brother, and I think very rightly, says, "I am not prepared to swear that those two feathers are identical with those I gave him." If the brother was swearing falsely he would have gone the length of swearing that they were the same feathers. This fact rather confirms the brother's evidence, and I attach considerable weight to it. As the Magistrate does not say that he disbelieves the brother, I think we may safely now say that we do believe the brother. We have the evidence that the prisoner had two feathers from his brother, that they were the finest of his brother's birds. What has become of them? They have not been traced to anybody, and it seems quite as likely as not that these feathers in court are the identical feathers given by prisoner's brother. The father was examined on this point, and, contrary to what appears to have taken place when the experts examined the feathers, they were mixed, and he was asked to select which were the two from amongst all the others. The father found one of the feathers which had been given by the brother. And then the prisoner was a young man of seventeen, and delicate also, and it does seem very unlikely that he would by himself have gone up to a vicious ostrich and stolen those feathers. In the face of what has been described, it would be a very great injustice if this young man should continue to serve this very long sentence of six months' imprisonment. I am satisfied that if this case had come before a jury, the judge in charging the jury would have told them that although it was a case of suspicion, it would be extremely dangerous upon the evidence merely of experts, who said that those five feathers in court were all from one bird, to convict this boy. I cannot hold that any jury would have convicted him, and the Magistrate would have done better to have given the prisoner the full benefit of the very reasonable doubts which existed in this case. I think, therefore, that the Court cannot confirm this conviction, and must quash it.

Mr. Justice Buchanan was not present at the hearing of this appeal.

Mr. Justice Maasdorp said: I think the Magistrate should never have convicted on this evidence. The evidence is wholly insufficient to establish the guilt of the accused. It seems almost entirely based on the opinions of experts, which, although often very useful in supporting other evidence, should be accepted with great care when it is the only evidence. There is not a single other circumstance pointing to prisoner as the thief.

[Appellant's Attorneys, Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

ADMISSION. { 1896. June 17th.

On the motion of Mr. Buchanan, Mr. A. J. Owen was admitted an attorney of the Court.

RESIDENT MAGISTRATE'S CASES REVIEWED.

Mr. Justice Maasdorp said that a case had come before him as judge of the week. An appeal had been brought from the decision of the Resident Magistrate of Caledon. Five prisoners had been charged with sheep-stealing. Evidence was taken against

all five, and after several witnesses had been heard, one of the prisoners was taken out of the dock and called as a witness. After she had given her evidence, three prisoners were acquitted and one convicted, and it was clear that the conviction followed simply upon her evidence. In this case the person who had been called as a witness should first have been acquitted and discharged before her evidence was taken. As that was not done, she was not a competent witness, and the conviction and sentence must be quashed.

SCHROEDER V. COLONIAL GOVERNMENT.

Act 27 of 1893, section 12—Proclamation 134 of 1896.

This was an application by Mr. W. H. Schroeder upon notice to Mr. Faure, Secretary for Agriculture, as representing the Colonial Government, to show cause why the Proclamation No. 134 of 1896, of His Excellency the Governor, published in the "Government Gazette," should not be declared *ultra vires* and illegal, and null and void as far as Gordonia is concerned. The Proclamation declared Gordonia among other areas to be an infected district and prohibited removal of the animals in such area without sanction from the proper officers. A meeting of the farmers of the district had been held, and a resolution passed, thanking the Government for its action against the rinderpest, but expressing the opinion that the Kalahari Desert should be utilised as a natural boundary between the present *locale* of the disease and Gordonia, and the whole of British Bechuanaland; and that Gordonia should not be included in the schedule until the disease should show itself there.

Mr. Searle, Q.C., for applicant.

Mr. Sheil (Assistant Law Adviser) for respondent.

Mr. Searle: Applicant only differs from Government as to the *means* taken by the Government to check the rinderpest. He takes up the position that the Proclamation No. 134 of 1896 (issued under the Animals Diseases Act, No. 27 of 1893, section 12) as it stands is not warranted by the Act. He wants the word "Gordonia" removed from the schedule. The validity of the proclamation will to a considerable extent depend upon the construction of the words in section 12: "The Government may from time . . . . embracing or forming part of any *district*." Can the Government describe any area (including various districts) in any *part* of which the disease may exist—or only any given district in which the disease has *actually* broken out. Compare section 9, which limits the word "district" to a magisterial district. The Government might proclaim the whole colony at once.

The Chief Justice: Say the disease breaks out in Mafeking. Vryburg is a continuous area up to and with Mafeking. Can not the Government proclaim Vryburg though free from the disease?

Mr. Searle: Reading section 13 with section 12 as we must, it is clear that the word "area" is limited in application. Section 15 shows this also. The applicants go largely on the geographical and natural position of the areas.

The Chief Justice said it might be a case of hardship for the plaintiff and others in Gordonia, and if it was a hardship it was one which they must suffer for the benefit of the whole community. The simple question now was whether the Governor had the power by proclamation to do what he had done. In his opinion the Act was perfectly clear, and the power was intended to be conferred upon him. If Mr. Searle's contention were correct, then it would be impossible in any one area to include more than one district. A disease might break out in one district on the very border of another district, but the Governor could not then include that other district in the area, because the disease had not actually broken out. In his opinion that was not actually intended. The intention was that the Governor should include in any area any number of districts. Of course, it was supposed that the Governor took competent advice, and he had no doubt that in this case competent advice had been taken. It might be that the line of cordon suggested by the applicant might be better, but the applicant must use his powers of persuasion with the Governor. The Court could not decide upon the respective merits of cordons. The words, "Area embracing several districts," quite justified the Governor in issuing a proclamation. The application must be refused with costs.

[Applicant's Attorney, G. M. Walker; Respondent's Attorneys, Messrs. Reid & Nephew.]

COLONIAL GOVERNMENT V. COETZEE.

Mr. Sheil applied on behalf of the Government for leave to sue Johannes Jacobus Coetzee by edictal citation for £10, the purchase price of some land bought by him at Barkly West under Act 15 of 1887, and of which he had paid no part, nor instalment, nor had passed a mortgage bond for the balance. He had left the district, and was now in the Orange Free State.

The Court granted the edict, returnable on the 25th July, and to be advertised in the Bloemfontein "Express."

The Court granted a similar order against Jan Louis Coetzee, in similar circumstances.

WILHELMINA D. VAN NIEKERK.

Mr. Graham moved, on behalf of Wilhelmina D. van Niekerk, for an order requiring applicant's husband to contribute a sum of money to enable her to institute an action against him for judicial separation, by reason of his alleged misconduct, and for an interdict restraining him from disposing of or alienating any property belonging to their joint estate.

Mr. Sheil appeared for the respondent.

The Court granted no order on the application, the respondent undertaking to deliver to the applicant all property in his possession belonging to her, and also the sum of £9, the proceeds of the sale of a certain cart; the costs to abide the result of the action brought by applicant against respondent.

SUPREME COURT.

(IN CHAMBERS.)

[Before the Right Hon. Sir J. H. DE VILLIERS P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

Re R. B. GOLIAD BELELIE. { 1896. June 30th.

Mr. Justice Buchanan said this was a case where Goliad Belelie was charged with theft by means of embezzlement as chairman of Dysseldorp Village Management Board, and that as such he received sums of money into his possession. He was charged with having received £30 0s. 6d., and not paying it into the bank. A preparatory examination was taken in which it transpired that he received another £15 in addition to the £30 0s. 6d. The case was remitted by the Attorney-General generally to try on the preparatory examination. Accused was charged with stealing only the £30, but it was clear the Magistrate had the £15 matter before him as well as the £30. The case was adjourned by the Magistrate in order to allow arrangements to be made for paying the money, and a fine of £25 or six months' imprisonment was imposed. The £30 which formed the matter of the charge was paid in; also the £15 and 10s. interest. Afterwards a second charge was brought on the same £15. This case was tried before another Magistrate, and accused was convicted and sentenced to pay another fine of £25 or six months' imprisonment. The papers were referred to the Attorney-General, who offered no objection to the quashing of the second conviction. It appeared practically that the man had been tried twice on the same charge. The second conviction would therefore be quashed.

LAWTON V. SEA POINT MUNICIPALITY.

Act 45 of 1882—Act 5 of 1895—Election of Councillors—Qualification for nomination.

This was an application by Thomas Edward Lawton against F. J. B. Langerman, the chairman of the Sea Point Municipality, as returning officer, and also against the Council themselves, for an order in terms of the petition, viz., that the Council be restrained from going on with the election until the said Thomas Edward Lawton was accepted as a duly-nominated candidate for the Municipality.

Mr. Searle, Q.C., for applicant.

Mr. Benjamin for respondent.

The applicant's petition set forth:

1. That your petitioner is a male person of full age, liable to be rated in respect of immovable property, within the municipality of Green Point and Sea Point.

2. That your petitioner is a large landed proprietor in the said municipality.

3. That the property in respect of which your petitioner is liable to be rated is of a yearly value of more than £20 and that he is the owner thereof, and that he has been the owner of property of the yearly value of £20 for a period of five years and upwards.

4. That no municipal rates in regard to any property owned or occupied by your petitioner remain unpaid.

5. That recently in terms of Act 45 of 1882, made applicable to the said municipality under and by virtue of the terms of the Act No. 5 of 1895, nominations were called for candidates for election as councillors of the said municipality.

6. That thereafter a nomination was duly lodged nominating your petitioner as a candidate for the office of councillor of the said municipality at the forthcoming election in this year.

7. That the nomination paper was in the form prescribed by law, and was signed by five persons whose names your petitioner was informed appear on the voters' roll.

8. That your petitioner learned on Saturday the 20th of June that he had been disqualified by reason of an alleged defect in his nomination, of which he was not aware.

9. That on Monday the 22nd inst., he went to the Municipal Office, and speaking to John Young the Municipal Clerk, applied to be allowed to see the nomination paper, inspection of which was granted to him. He then asked to be allowed to see the voters' roll, but was informed that the original voters roll' had been sent to the printers, and that there was no copy in the possession of the Clerk. In reply to a further question, he was then informed that the reason why his name had not been put forward as a duly nominated candidate was because one Stephen M. Christie who had signed the nomination paper had not paid some rate alleged to be due by him. But the Clerk stated that the names of the five persons who signed the nomination paper were on the voters' roll, and that but for Christie's disqualification on account of not having paid some rate, the nomination would have been in order.

10. The said Christie has informed your petitioner that he denies any liability for rates, and has shown your petitioner a receipt for the payment of all such rates as he deems himself to be legally responsible for.

11. In terms of Act 45 of 1882 advertisements have been published by the returning officer, F. J. B. Langerman, stating the names of the persons nominated, and appointing a day for holding the poll.

12. That your petitioner's name is not included among those of the candidates nominated.

The prayer of the petition was for an order restraining the Council of the Municipality of Green Point and Sea Point and its Chairman (F. J. B. Langerman) in his capacity as returning officer from proceeding further with the election until petitioner's name is included amongst the candidates duly nominated, and further ordering the said Council and the returning officer to issue the advertisements required by the Act 45 of 1882 in amended form so as to show petitioner to be a candidate duly nominated for the forthcoming election of Councillors for the said Municipality and further ordering the Council and the returning officer to pay the costs of this application for the respondent.

John Young, the clerk to the Municipality, made affidavit:

1. That Mr. Lawton's name though on the assessment roll is not on the voters' roll.

2. That Mr. Christie's name is on both the assessment roll and the voter's roll.

3. Mr. Lawton's nomination paper is signed by five persons, one of whom is Mr. Christie.

4. Mr. Christie's name stands on the assessment roll as being liable for the following properties:

Ground, Clarence-road	£1	3	5
Residence, Arbroath Lodge... ...	18	5	8
Ground, Kloof-road	1	2	6
	20	11	7

The total Municipal rates on these properties amount to £20 11s. 7d.

On the 8th of June of this year Mr. Christie paid on account of these rates the sum of £18 5s. 8d. leaving a balance of £2 5s. 11d. still due by him. These rates were assessed on 20th December last and fell due on 4th January this year.

5. In August last year notice was given that a court of appeal would be held against the valuations on the properties. Mr. Christie did not appear to object to the valuations, nor did he lodge any.

6. Unless I receive formal intimation that Mr. Christie has sold any of his ground, to whom and when, he will continue to be charged with the annual rates on the three properties.

7. Mr. Lawton's nomination was rejected because Mr. Christie had not paid his rates in full and was thus not a voter as he styles himself in terms of the nomination paper under section 5) of the Act, and he had also not complied with section 28 of the Act.

Mr. Stephen Meintjes Christie stated on affidavit that in regard to the two items of £1 3s. 5d. and £1 2s. 6d. for which the Municipality of Green Point and Sea Point held him liable Mr. Richard Villet, who is collecting the outstanding debts on behalf of the municipality, has informed him that both these items have been accepted from Mr. Marks of Pretoria, the payments having been made by Mr. Jansen, broker, Cape Town.

Mr. Searle: Application turns on the construction of the Municipal Act 45 of 1882, especially section 50. It is common cause that Christie's name was on the voters' roll—the only point is whether he has paid rates. Section 60 shows disqualification (if voters have not paid rates) for *voting*. But it has nothing to do with the voters' roll in section 50 for purpose of *nomination*, &c. Sections 31–36 refer to preparation of the voters' roll. The voters' roll was finally prepared in accordance with the section. Section 28 is important. *Searle* v. *Parsons* (7 J. 366) is instructive, though not precisely in point.

The Chief Justice: What is Mr. Lawton's qualification? He is not on the voters' roll,

Mr. Searle: Mr. Lawton is clearly qualified in terms of section 15.

Mr. Benjamin: The last words in the 50th section of the Act must refer to persons who are capable of voting at the time. They refer to the second schedule "we the undersigned *voters* of the municipality."

The Chief Justice: Supposing the polling officer (who is not bound to do so) does not question him as to whether he is a voter, or supposing he answers falsely. In the latter case he may be punished later—but in either case the polling officer is bound to accept his vote.

Mr. Benjamin: Section 28 and the second schedule seem to imply that the nominators must be voters.

The Chief Justice: The only test as to a person's right to sign a nomination paper is whether or not his name appears on the voters' roll. If it appears on the voters' roll he is entitled to sign the nomination paper. It is quite true that when it comes to the actual poll the polling officer may then put certain questions to any voter, and one is whether he has paid his rates; and if he admits he has not paid his rates he is not entitled to vote, but that does not affect his original right to sign the nomination paper. The only thing that is relied upon on behalf of the respondents, is the second schedule to the Act (No. 45 of 1882), which reads, "We the undersigned voters do hereby nominate such and such a person, &c." It is argued that because voters must sign the nomination paper therefore Mr. Christie not being a voter could not sign it. But he was a voter and entitled to vote. The only case where he would not be entitled to vote would be if in answer to a question he were to say he had not paid the rates. It seems quite clear from the evidence that if the question were put now: "Have you paid the rates?" his answer would be "I have." If once he gave that answer *a fortiori* he was entitled to sign the nomination paper. It seems perfectly clear that the leave sued for by the applicant ought to be granted with costs.

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

VAN DER VYVER'S EXECUTORS V. SWANEPOEL. } 1896. July 13th.

Mr. Jones applied for provisional sentence on a mortgage bond for £130, with interest from the 1st July, 1896, and asked that the property hypothecated be declared executable.

Provisional sentence with costs was granted.

MOSENTHAL V. HASSELBACH.

Mr. Benjamin applied for provisional sentence on an acknowledgment of an account. Granted.

REMERSON, SAUER AND CO. V. BALDWIN.

Mr. Benjamin applied for confirmation of arrest. Defendant appeared, and confessed judgment.

Judgment was made absolute, with costs, and defendant was discharged from arrest.

HEWITSON, JEFFREY AND CO. V. SOLMS.

Mr. Buchanan applied for a final adjudication of defendant's estate, sequestrated on a provisional order made on the 7th July.

Granted.

TURVEY V. PIENAAR.

Mr. Buchanan applied for provisional sentence on two mortgage bonds—one for £100, with interest at 10 per cent., and another for £200, with interest at 12 per cent., the bonds having become payable by reason of the non-payment of instalments and interest in the former case and for non-payment of interest in the second case.

Provisional sentence was granted.

KRYNAUW AND CO. V. WEST.

Mr. Maskew applied for provisional sentence on two promissory notes for £27 7s. 11d. and £67 respectively, less £53 paid on account.

Granted.

JOSEPH V. POTGIETER.

Mr. Close applied for provisional sentence on four promissory notes for £41 17s. 10d., £150 15s., £80 10s., and £45 10s. respectively.

Granted.

VAN WIESGE'S EXECUTORS V. HOME.

Mr. Molteno moved for provisional sentence on a bond for £54, with interest, being the rent of a farm for two years.

Granted.

VAN NOORDEN V. LE ROEX.

Mr. Tredgold applied for provisional sentence on a bond for £60 8s., passed by the defendant, and duly ceded to plaintiff.

Granted.

ILLIQUID ROLL.

GEORGE'S EXECUTORS V. LUCKE.

Mr. Graham moved for judgment for the sum of £93 3s., received by defendant from Mr. Welch, as proceeds on the sale of the effects of Alfred George.

Granted.

WATSON V. WATSON.

Mr. Buchanan, for applicant, moved for an order appointing Mrs. Watson curator of the personal property of her husband.

Mr. Jones appeared for the *curator ad litem*.

Dr. Wm. John Dodds, medical superintendent at the Valkenberg Asylum, testified as to the condition of the defendant. He was touched with acute melancholia, and was under the impression he had committed a murder. He was extremely taciturn, and took very little food. He was of opinion that defendant was in such a state of mind as not to be able to take care of any business of his own.

It appeared he had a large business at Hope Town. After evidence by Mrs. Watson,

Mr. Justice Buchanan said the Court would issue a decree declaring the respondent to be of unsound mind, appointing Mrs. Watson and Mr. Van Coller curators of the property, and Mr. Van Coller of the person, to give security to the amount of £5,000, the curators to have powers under sub-sections 3, 5, and 8 of the 45th section of the Lunacy Act, No. 35 of 1891, to make the reports required by section 7, with power to provide suitable maintenance for the wife and family; costs to come out of the estate.

REHABILITATIONS.

Ernest Alfred Rawstone.—Granted on the application of Mr. Benjamin.

James W. Heathcote.—Granted on the application of Mr. Buchanan.

Johannes H. Spies.—Granted on the motion of Mr. Tredgold.

Bernhold Arnholz (personally and as partner in two firms of Arnholz & Co.).—Granted on the motion of Mr. Sheil.

Edward Thomas Pitt.—Mr. Buchanan applied. Refused, with leave to apply later.

George Henry Petersen.—Granted on the application of Mr. Close.

Emile O. H. Wirth.—Mr. Buchanan applied. Adjourned till first day of term.

John Verity.—Granted on the application of Mr. Buchanan.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF JAMES MCCABE.

Mr. Close moved for the appointment of a commissioner at Queen's Town to take the evidence of the said insolvent and of certain other persons named as able to testify concerning his trade and dealings; and further, for an extension of three months to the time allowed to the trustee within which to file his account.

The Court granted the order. The Resident Magistrate of Queen's Town was appointed commissioner.

METZLER V. METZLER.

Mr. Joubert moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights; and for an order giving the custody of the child of the marriage to the mother.

A decree was granted, with costs, the applicant to be given the custody of the minor child.

THE PETITION OF PAMIE FORTUNI.

Mr. Benjamin moved for authority to the Registrar of Deeds to pass transfer to the purchaser of certain piece of ground near Valkenberg, in the Cape Division, without the written consent of one of petitioner's sons, who has a reversionary interest in the land, he having agreed to the sale thereof to enable petitioner to pay her debts; but neglected or declined to sign the said consent.

Mr. Justice Buchanan stated the case was not one in which the Court could make the order.

THE PETITION OF TSIKILA JAFTA.

Mr. Benjamin moved for an order authorising the transfer to petitioner, a Basuto, and his brothers of certain portion of the farm Driefontein, in the district of Matatiele, from the estate of their late father, the said land having been declared by the Court of the Resident Magistrate for the said district to be the joint property, according to native custom, of the fourteen sons of the deceased.

A rule *nisi* was granted, returnable in a month, to be published in "Imvo."

THE PETITION OF FRANCIS C. W. EAGLE.

Mr. Close moved to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for transfer to petitioner of a certain lot of ground marked No. 6 in the village of Aberdeen, at present registered in the name of Barend J. Vorster, but which was taken over from him in satisfaction of a debt due, without any transfers to the persons concerned, and sold to petitioner.

The rule was made absolute.

HABIG V. HABIG.

Mr. Molteno moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights.

A rule absolute was granted.

GAVIN V. HIS *Curator Bonis*.

Mr, Tredgold moved for an order relieving the respondent from his trust as *curator bonis* to applicant, who was in 1894 ordered to be detained under the provisions of the Lunacy Act, but who has since recovered

his reason; and further requiring the respondent to deliver up all property belonging to applicant.

An order was granted for the discharge of the lunacy order, and of the curator from his trust.

THE PETITION OF JOHN P. WILDREDGE.

Mr. Graham moved to make absolute the rule *nisi* for registration in the name of petitioner of the remaining extent of the farm Nooitgedacht, situate in East Griqualand, he having purchased an undefined half-share of the said farm at a sale in execution, and having since then come to an arrangement to acquire instead a defined portion.

Mr. Benjamin opposed the motion on behalf of Katrine Kok, a co-owner of the farm.

Mr. Justice Buchanan, in giving judgment, said: In 1879 William Kok then owner of the farm Nooitgedacht, sold a half-share of the property to Mrs. Katrina Elizabeth Kok, but no transfer was effected to her. In 1883, applicant obtained a judgment in the Magistrate's Court at Kokstad, against Kok and his remaining half-share was sold in execution and bought by applicant. This sale was confirmed by the Chief Magistrate of Griqualand East. In 1889 by mutual arrangement between Mrs. Kok and applicant, a partition of the farm was effected and transfer of a divided share given by Kok to Mrs. Kok, before the Registrar of Deeds either through oversight or in ignorance of the judicial attachment and sale of an undivided share. Applicant afterwards applied to the Chief Magistrate for transfer of the remaining extent, but he declined to give such a transfer on the ground that an undivided half-share having been attached and sold, he had no power to transfer a defined share. It appeared that Mrs. Kok had intervened in the original proceedings between applicant and William Kok, and that she had throughout been represented by her legal adviser. The farm had been surveyed for division by Mr. Watermeyer, who with the consent of the parties awarded the homes, kraals and arable land to Mrs. Kok, and the grazing lands which were of larger extent to applicant. Mrs. Kok during her lifetime, and her executor after her death leased her portion of the farm from time to time. Applicant from time to time endeavoured to get transfer of the remaining extent of the farm directly from William Kok, but he would not sign a power-of-attorney unless he received a bonus of £10, which applicant refused. Mrs. Kok's executor now opposes the rule granted by the Court, on the ground that the division by Surveyor Watermeyer was an unfair one, and was effected without her knowledge; and that William Kok also was unaware of any such an arrangement as that set up by applicant, and that he had never knowingly signed any papers to effect the division which had taken place. The Court, however, is of opinion that the affidavits furnish distinct proof of the agreement; and further that the action of the executor after the death of Mrs. Kok, as far back as September, 1889, in selling and transferring her defined share, to one McGregor, is fatal to his opposition. The transfer originally was irregular, but nothing will now be gained by upsetting the deed. No injustice can be done to Mrs. Kok's estate by allowing applicant to register title to a defined share instead of an undivided half. To give title now to an undivided half of the whole farm would affect the title of innocent purchasers from Mrs. Kok's estate, who are not now before the Court. The rule will therefore be made absolute. As the applicant would have been obliged to come to the Court, costs of the application would have to be paid by the applicant and the cost of opposition paid by respondent.

[Petitioner's Attorneys, Messrs. Reid & Nephew; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

THE PAARL FRUIT-PRESERVING COMPANY.

Mr. Graham applied for an order in terms of the second and final report of the official liquidators.

An order was given for the company to be liquidated and the company's books destroyed.

DARROLL V. THOMPSON AND ANOTHER.

Lease—Alterations by lessee—Interdict.

A. *hired from* B. *a portion of* B.'s *house and wished to break down a portion of the building and make considerable alterations, against* B.'s *wishes.*

Held, *on application for an interdict, that* B. *was entitled to restrain* A. *from making the proposed alterations as, though a tenant might in certain cases be entitled to make alterations in premises leased by him, in this case the alteration would prejudicially affect the landlord in the use and occupation of the remainder of the property.*

This was an application to make absolute the rule *nisi* interdicting the respondents from

in any way altering or adding to the shop known as Granite House, situated in the main road, at Wynberg, leased by them from the applicant.

The facts appear sufficiently from the argument and judgment.

Mr. Searle, Q.C., moved.

Mr. Benjamin appeared for respondents, and urged that the interdict should not be granted, as respondent was entitled to make the proposed alterations: and at least plaintiff must prove substantial injury. *Underhill on Torts* (4 Ed. p. 97), *Dougherty* v. *Allman* (39 "Law Times," N.S., p. 129) show that the point to be considered is the relative injury to be sustained by the lessor and the benefit to be gained by the lessee. The "waste" or alterations in this case would not be considerable. The architect says that the alterations could be removed and restored at the cost of a few pounds. The utmost damages would be the cost of restoration —and this would not be £10 or £20. *Underhill* says that this is not a kiud of case in which injunction would be given. Consider on the other hand the damage which we would sustain. The Wynberg trade is a growing one. We must be allowed to alter the property in view of the long lease.

After hearing the argument by Mr. Benjamin, the Court intimated that it was not necessary to hear counsel for the applicant.

Mr. Justice Buchanan said: I am not prepared to say that in no case whatever could a tenant occupying premises alter them against the wish of the landlord. But if the law allowed such an alteration, a very clear case indeed must be made out; for landlords are responsible, on the insolvency of their tenants for ameliorations, especially if they stand by and allow ameliorations to be made. I consider that it would require a very strong case indeed to compel the landlord to allow substantial alterations in his premises to be made against his consent. In the case cited by Mr. Benjamin there was an extraordinary long lease—one of 999 years—but in this case the lease is one of five years, of which one had expired, leaving only four years to run. Mr. Benjamin also contended that there would be no real and substantial injury done to the landlord. On looking at all the circumstances of he case, I think on the contrary that a most real and substantial injury will be suffered by the landlord if these alterations are allowed to go through. The applicant has let only a small portion of Granite House to the respondent and he now wishes to knock down walls, alter the building, erect a verandah, and enlarge the shop by running it out further into the street, in such a way as according to the affidavits, would very materially interfere with the alterations he himself proposes to make in the other part of the building. It was contended that the Court has a discretion in the matter. Assuming that the Court has such discretion, the present is not a case in which they should exercise it. The alterations would be beneficial to the lessee of the premises, but that is not of itself sufficient to entitle him to make them. I consider they would injure the landlord. The lease is a short one, and the alterations would even interfere with the landlord's use of the rest of the premises as they are. It was said that the Court should not prevent the tenants from "waste"—an English technical term—that the remedy of damages would be sufficient. This is not a case in which damages would be sufficient compensation to the landlord. It is another point against the tenant that by his lease the certain alterations to be carried out and completed before taking possession of the building. It was now said that there was a collateral agreement, and that if the respondent wished to have any further alterations he could carry them out at his own expense. This was distinctly contradicted by the other. Looking at all the circumstances of the case, the Court considered that even assuming they had discretionary jurisdiction in this matter, the respondent had no made out a case for insisting on the proposed alteration against the wish of the landlord. The rule would be made absolute with costs.

[Applicant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorneys, Messrs. Van Zyl, & Buissinné.]

SMITH V. SMITH.

Mr. Graham moved for the appointment of a commissioner at Johannesburg for the examination of certain witnesses for the plaintiff in the suit instituted by her against her husband for divorce by reason of his alleged adultery.

The order was granted as prayed, notice to be given to the defendant.

IN THE MATTER OF THE MINOR ZONDAGH.

Mr. Searle, Q.C., moved for authority to the executor dative of the estate of the late Cornelius J. Zondagh to pass transfer to himself of certain shares of the farms Avontuur, Krausfontein, and Braamfontein, and to raise a sum of money on mortgage of the same to pay out a bequest to the said minor, and for other purposes.

The Court granted an order for applicant to transfer to himself one half of the estate on condition of his paying the sum of £50, his share of the minor's inheritance, into the Guardians' Fund.

IN THE ESTATE OF THE MINORS LE ROUX.

Mr. Jones moved for authority to the father and natural guardian of the said minors to dispose of their shares of certain farms in the district of Swellendam accruing to them, and of the estate of their grandparents, the same being too small for profitable use, and a good price having been offered for the same.

The Court granted an order in terms of the Master's report, the money to be paid into the Guardians' Fund if not invested to the satisfaction of the Master.

IN THE INSOLVENT ESTATE OF GEORGE G. N. VAN GASS AND WIFE.

Mr. MacGregor moved for the appointment of commissioners at Queen's Town and Maclear to take the evidence of the said insolvents and of other persons concerning certain valuable assets said to belong to the estates which have not come into possession of the trustee.

The Court granted the order, the Magistrate at Queen's Town to examine the persons named in the petition, and also the insolvent and his wife.

IN THE INSOLVENT ESTATE OF PAULUS J. VERDOES.

Mr. Buchanan moved for an extension of time of twelve months to the period in which the trustee is required to file his account it being for the benefit of the creditors that the sale of the landed property of the estate should be postponed to a more favourable time than the present.

Mr. Benjamin opposed on behalf of Mr. Braudé, the second largest creditor, and applied for an adjournment of the case.

Mr. Buchanan objected, but the Court adjourned the case till the first day of term.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

IN THE ESTATE OF THE LATE GEORGE PIGOT MOODIE. { 1896. July 14th.

Will — Minor inheritance — Benefit of minor—Sentimental value—Sale of property bequeathed.

A *by his will bequeathed a large landed property at Rondebosch in the Cape Division to "my eldest son* G. *or my eldest son surviving at the time of my death."*

G. *succeeded to the property at the age of nine years. After great difficulty the estate was let at* £300 *per annum for a maximum period of five years. The estate however was liable for* £160 *per annum for taxes and insurance, and large annual expenses were required for its maintenance.*

An offer was made to the executors, to purchase the property for £17,500. *The Master strongly recommended it, as being greatly to the minor's benefit that the property should be so sold. On application to the Court,*

Held, *that as from the will the testator desired the estate to remain in the family, although it might be more to the minor's benefit to sell than to adhere to the sentimental value placed on the property by the testator, the provisions of the will must be carried out, the minor in this case being owed of ample means to keep up the property.*

Mr. Searle, Q.C., moved for authority to the trustees and executors of the estate to sell certain property of the estate, being the house and lands known as Westbrooke, at Rondebosch, the same being expensive to keep up and difficult to let, while an offer has been made to purchase at a price considered good, it being the intention to invest the proceeds for the benefit of the minor heirs of the testator, who died at Rondebosch in 1891. An offer of £17,000 had been made for the property.

The following was the applicant's petition:

I. The late George Pigot Moodie died in November, 1891 at Rondebosch in the Cape Division, leaving a will in which among other provisions appeareth the following:

1. To my wife . . . . all my plate, linen, glass, china, books, pictures, prints, wines, liquors, furniture and other household effects, and all my carriages, harness, and horses.

II. To my wife the use and enjoyment during her lifetime of my landed property at Rondebosch, being the estate called Westbrooke with adjoining land portion of Kleinschuur and any other adjoining or adjacent land which I may be possessed of.

III. Subject to the use and enjoyment thereof by my said wife during life to my son George Frederick Arthur Pigot Moodie, or to my eldest son then surviving, the landed property aforesaid.

IV. To my said son or to my eldest son as aforesaid the sum of forty thousand pounds, if and when he shall attain the age of 21 years.

V. To each of my children other than my eldest son as aforesaid in the case of sons on attaining that age or marrying previously with the consent of their mother, or in the case of their mother's death with the consent of their guardians, the sum of twenty thousand pounds.

And after providing for several bequests:

VI. Subject as aforesaid I institute and appoint my children jointly and in equal shares to be the sole and universal heirs of all the residue and remainder of my estate and effects, movable and immovable and of what nature and kind soever and wheresoever situated, and if one or more of such children shall die in my lifetime having issue, such issue shall come into the place of the deceased parent by representation according to the laws of succession.

VII. I give and bequeath to my said wife during her lifetime the interest or other income of a sum of seventy thousand pounds, and at her death the said sum of seventy thousand pounds shall fall into and form part of my remaining estate.

A copy of the said will is hereunto annexed, marked "A."

2. The said wife of the testator died on 17th day of January, 1896, in England, leaving a will, copy of which is hereunto annexed marked "B," in which she made certain bequests including one to her eldest son the said George Frederick Arthur Pigot Moodie, of all the silver and books both in England and at the Cape the oil paintings of her late husband and of the late Commodore Moodie and the sword and baton that belonged to the latter, and also the furniture and contents of her late husband's house at the Cape called "Westbrooke," but under the said will the said George Frederick Arthur Pigot Moodie would receive a smaller portion of the said testatrix's estate than the other children,

3. Shortly after the death of the said George Pigot Moodie it was found that the estate would not realise nearly as much as the testator anticipated when he made the will and disputes arose as to how in the altered circumstances the provisions of the will should apply. A special case was submitted to Court and judgment given on the 27th May, 1892.

4. Petitioners believe that the ultimate distribution to the eldest son (who is now nine years of age) will be in respect of the legacy of £40 000 approximately £24,000, and in respect of his share of the residue £12,000.

5. The said Westbrooke and adjoining land is valued for Divisional Council purposes at £8,000 and for Municipal purposes at £14,000. It (exclusive of the gardener's lodge) has been let fully furnished for a period of three years reckoned from the 8th September, 1894, to 7th September, 1897, at a rental of £300 per annum, but previous to such letting great difficulty had been experienced in finding a tenant and petitioners anticipate the same and perhaps greater difficulty in letting it in the future.

6. The rates payable in respect of the said landed property amount to £120 16s. 8d. per annum, and insurance and other expenses are approximately £40 per annum.

7. Petitioners do not consider that they will be allowed without the sanction of the Court to make use after the expiration of the present lease of "Westbrooke" of the furniture and other things in the said house, these having been specially bequeathed to the said George Frederick Arthur Pigot Moodie under the will of his mother.

8. The wear and tear entailed on the furniture and buildings is considerable and will in the future necessitate the expenditure of large sums of money by the trustees. Owing to the great extent of the buildings and the large surface exposed to the action of the weather, your petitioners consider that a sum of at least £100 per annum should be spent on keeping the exterior of the buildings alone in suitable repair, and it is very probable that from time to time much larger sums will be required to be spent on the buildings. In the event of the house being unoccupied your petitioners estimate that it will be necessary to spend about £30 per annum on wages in arranging for the charge of the house and the keeping of the grounds in a reasonable and proper manner and the estate will then be liable for tenants' rates.

9. Owing to the size of the house and gardens the owner or occupier thereof must be some one

possessed of considerable wealth in order to properly maintain the necessary establishment, and it is extremely difficult in this country to meet with such a person willing to own or occupy the said place.

10. On the 8th day of May, 1896, Mr. Sydney Stent acting for an undisclosed principal made an offer of purchase for the sum of £17,500, subject to the conditions set forth in the letter hereunto annexed marked "C." The said offer was subsequently varied inasmuch as the furniture in the house was excluded from the sale.

11. Petitioners being of opinion that the price offered is satisfactory and that it will be greatly to the interest of the said minor that the offer should be accepted and the proceeds invested for his benefit. have thought it expedient to submit this petition. While property as a rule has greatly increased in value since the death of the late Mr. Moodie it is admittedly a fact that large properties of this description are most difficult to dispose of.

12. By the will of the said George Pigot Moodie and wife it was provided that in the event of the death of the survivor of them the testator's sister Edith Jessie Georgina Moodie should be guardian of the minor children.

Miss Moodie has however been advised that such an appointment was invalid in this colony and cannot be acted upon. She was also nominated as guardian jointly with another by the will of the said Rosa Maria Pigot Moodie, but petitioners do not know whether any official appointment has been made. The said Edith Jessie Georgina Moodie agrees with petitioners that the said landed property should be sold, as will appear from the letter hereunto annexed marked "D."

The following is the Master's report:

From a perusal of the will, of which a copy is annexed, it is clear that it was the intention of the testator that the property named "Westbrooke" should remain in his family, if not for his eldest son then for his eldest surviving son. But although it would appear that to accentuate his intention the testator made special provision for the eldest son he has not made similar provision for the eldest son then surviving in the event of the death of the former. To the widow was bequeathed the usufruct of the property for life, but by her early death the eldest son will come into possession when he attains majority. He is now nine years of age, consequently the property must either be leased or it must be placed under the care of properly paid persons for a period of twelve years. Petitioner has very fully set forth the expense and difficulties attending the management of such a large property, and the question to be considered is whether, if the Court would grant the authority, it would not be for the benefit of the minor rather to sell it.

A sworn appraiser accompanied petitioner and myself to inspect the property: his valuation is £20,000, which I do not think excessive. It is now leased for three years at £3 0 per annum. Two years of the lease have expired, but the lessee has the option of renewing it for two years, a right which I am informed he intends to exercise: the property is therefore subject to a further lease of three years.

(*a*) Looking now at the transaction from the purchaser's point of view he offers a sum of	£17,500
and he would lose by the lease having still to run for three years the interest on the purchase money for the period, say at 4 per cent.	2,100
He would also have to pay taxes for three years at £161 per annum and repairs at £100 per annum, or	783
or a total of	20,383
in reduction of which he would receive £3 0 per annum for three years or	900
His outlay therefore would be ...	£19,483
(*b*) But assuming that petitioner retains the property and would experience no greater difficulty in letting it for the same rental of £3 0 per annum after the expiration of the lease until the minor attains majority, and assuming also the rate of taxation to remain the same which is hardly likely, then it would be far less beneficial to the minor, for he would lose the interest for twelve years on the purchase price £17,500 now offered, at say 4 per cent. compound interest, amounting to	£10,518
He would have to pay rates £161 and repairs say £100 amounting to ...	3,132
	£13,650
Towards which he would receive £300 per annum for twelve years amounting to	3,600
He would therefore be a loser when he attains majority of about ...	£10,050

At the rate of 5 per cent. the minor would be a loser of about £13,459 10s. when he attains majority.

That is to say, that the rental obtainable is only slightly more than sufficient to pay taxes.

(*c*) The other aspect of the question, namely of petitioner having to retain the property and not being able to lease at all and having to pay about £300 per annum besides for caretakers, labour, taxes, repairs, and tenants' rates, is of course far more serious.

I am of opinion that it would clearly be in the interest of the minor to accede to petitioner's request, and in the event of your lordships finding that it would be more beneficial to the minor to sell the property rather than to adhere to a sentimental value placed thereon by the testator, then I would suggest that a middle course be adopted and a price be fixed somewhere between the offer made and the sworn appraiser's valuation, say £18,750, which as shown above in paragraph (*a*) would be in excess of the present worth of the property subject to a three years' lease and would give about £20,885 at 4 per cent.

After argument,

Mr. Justice Buchanan said this application was grounded on the circumstance that the sale of the property would be more beneficial to the minor than would be the carrying out of the intention of the testator. The Master had reported it was clear that the intention of the testator was that the property should remain in his family, if not for the eldest son then for the eldest surviving son. It was not for the Court to say that the testator's intentions whether sentimental or otherwise should be set aside simply because by so doing a greater benefit would accrue to the minor. On this ground alone at present the application must be refused. But notwithstanding this difficulty, it had not been made clear to the court that it was beneficial to the minor to sell the property, at the price named. The offer of £17,000 which had been made, and which the Court had been asked to confirm, was not the full value of the property. The Master had had the property valued, and his valuation was £2,500 more than the offer. He said that by calculating interest and deducting expenses the offer amounted to the full value of the property. To show that the offer submitted to the Court was not the best obtainable, since the matter had been before the Court, Mr. Searle said that the intending purchaser was willing to advance the sum of £500 upon his former offer. That afforded some proof that the executors had acted somewhat hurriedly in bringing the matter before the Court. There had been no attempt to submit the property to public tender or competition. The testator desired the property to remain in the family, and the on in whom the property was now vested had a large fortune with which to keep up the estate! He could, therefore afford well to keep it in order. Under these circumstances the Court was not prepared to make any order on the present application.

Mr. Searle added that the executors had done their best to get a good offer for the property. They had procured a sworn appraisement from Mr. Jones for £14,500.

Mr. Justice Buchanan: I ought not perhaps blame the executors for coming to the Court, as they were of opinion that they were acting in the interests of the minor in so doing.

[Applicant's Attorneys, Messrs. Scanlen & Syfret.]

IN THE MATTER OF THE MINORS BELL.

Minors' Education—Use of capital sum instead of interest.

This was an application for authority to the executors of the estate of the late Mary Bell to pay over to the mother of the said minors the capital sum devolving upon them out of the said estate, to enable her to complete the education of her daughters, so that they will be in a position when of age to maintain themselves.

Mr. Benjamin applied and cited *Lewin on Trusts* (p. 662, section 39); *Ex parte Grewer* (4 J., p. 75); *Clay* v. *Pennington* (8 Symons, p. 359); *Voet* (35, 1, 15).

The Court refused the order. Mr. Justice Buchanan remarking that all such cases should come before the Master in the first place.

[Applicant's Attorney, G. M. Walker.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

IN THE ESTATE OF THE LATE MARIA DU PLESSIS. { 1896. July 14th.

A. and B. by their wills instituted M. as heir among others so that M. should have the interest of her share during her lifetime, and after her death the capital sum should go to her heirs. M. died. The Master, into whose hands in terms of the will the inheritance had been paid, declined to pay out her share to the executors of her estate, holding that it had never vested in M. and that as the will provided for the devolution of the property after M.'s death the money could be paid over to A. or B.'s executors only.

The Court *ordered the Master to pay to M.'s executors.*

This was an application for authority to the executors of the said estate to draw from the Master of the Supreme Court certain sums of money accruing to the estate under the wills of the uncle and grandmother, which sums the Master is unable to pay over without an order of Court.

Mr. Searle, Q.C., applied.

The applicant's petition was as follows:

1. That petitioners are the executors dative to the estate of the late Maria Magdalena du Plessis.

2. That by the last will and testament of Jan Abraham du Plessis, dated 7th day of February, 188', the testator appointed his brother Albert Meyburg du Plessis as one of his heirs, subject to the condition that the executor under his will should invest the portion of the said Albert Meyburgh du Plessis on good security and that only the interest accruing therefrom shall, during his lifetime, be paid to him, and that after his death to his grandchildren, the children of his daughter Hester Christina, married to Petrus Pretorius, and it was further directed by the said will that the portions of such of the heirs as were minors should be deposited with the Master of this Honourable Court.

3. That thereafter, on the 16th day of December, 1886, the said Jan Abraham du Plessis executed a codicil to the said will wherein, after reciting, *inter alia*, that the said Albert Meyburgh du Plessis had died and had left a second daughter, Maria, born after the execution of the said will, he directs that the said Maria shall inherit one half of her father's portion, which should, however, be deposited in a bank or with the Master of this Honourable Court, and that the interest should be paid to her for her support during her minority, and that at her death the capital sum should devolve on her heirs.

4. That by the last will and testament of Elizabeth Meyburgh, widow of the late Daniel Johannes du Plessis, the aforesaid Albert Meyburg du Plessis was appointed as an heir, subject, however, to the condition that the said Albert Meyburg du Plessis should only enjoy the interest on the amount of the inheritance, which inheritance was to be invested on good security or paid to the Master of this Honourable Court and that after the death of the said Albert Meyburg du Plessis, his widow should have the right to receive the said interest and after the death of both of them the interest should be paid to his daughter Hester, and to such other children as may be born to him, and such interest reckoned on their respective portions shall be paid to each child and after the death of any such children then the share of the child so dying shall devolve on his or her heirs and shall be paid out to them. Copies of the said wills are hereto annexed.

5. Both the said Albert Meyburg du Plessis and his daughter Maria Magdalena du Plessis are now dead and the widow of the said Albert Meyburg du Plessis, now married to Hendrick Pretorius, is willing that the share of the said late Maria Magdalena du Plessis should be paid out to her executors for distribution among her heirs.

6. The said Maria Magdalena du Plessis was a minor at the time of her death.

7. The petitioners, in their aforesaid capacity, are desirous of receiving the amounts due to the said Maria Magdalena du Plessis from the Master of this Honourable Court, for distribution among her heirs, but the said Master has declined to pay the same or any part thereof, without an order of this Honourable Court.

Wherefore your petitioners, in their said capacity, pray that your lordships may be pleased to grant an order authorising the said Master to pay to them:

(*a*) The share due to the late Maria Magdalena du Plessis out of the estate of the late Jan Abraham du Plessis.

(*b*) The share due to the late Maria Magdalena du Plessis in terms of the late Elizabeth Meyburg's will,

(*o*) Such further or alternative relief as to your lordships may seem meet.

(*d*) Costs of this application to be paid out of the funds belonging to the said Maria Magdalena du Plessis and now in the hands of of the said Master.

The Master reported as follows:

This petition deals with money devolving from two estates, namely:

Par. 3 refers to a sum of money set aside by an uncle named Jan Abraham du Plessis (copy of this will is annexed) in order that the interest thereof may be paid during the lifetime of his niece Maria du Plessis.

Par. 4 refers to a similar provision under will of the grandmother (copy of will annexed) of the abovenamed Maria du Plessis.

In both estates the testators direct their executors in what manner the money should be dealt with in the lifetime and after the death of the said Maria du Plessis: it appears therefore that the executors of the testators are the proper persons to whom the money should be paid for distribution, and if these estates are unrepresented an executor can be appointed and security taken for instance the secretary of one of the institutions may be appointed—for the proper distribution of the money, which never vested in the estate of the person of whose estate petitioners are the executors. For these reasons the Master declined to pay the money to them.

The order was granted, costs to come out of the fund.

[Applicant's attorney: P. M. Brink.]

PIRIE V. PIRIE.

Mr. Close applied for leave to plaintiff to sue her husband *in forma pauperis* in an action for divorce. Defendant had last been heard of at Fort Tuli in Mashonaland. The matter had been referred to counsel, who. under the special circumstances, had made the required certificate of probable cause of action.

The Court granted a rule *nisi* calling on the defendant to show cause on the last day of next term. The rule to be served personally, failing which, one publication in the "Bulawayo Chronicle."

GABINGE V. GABINGE.

Mr. Buchanan applied at bar for leave for plaintiff to sue her husband *in forma pauperis* in an action for divorce. The Registrar had declined to put the case on the roll on the ground that there were not special circumstances to justify the application.

The application was refused.

QUEEN V. MTETO. { 1896. July 14th.

Appeal—Act 21 of 1876, section 4—Gross irregularity in proceedings—Indictment—Joint offence—Misjoinder—Master and servant—Act 18 of 1873, section 4—Desertion from service.

M. *and* 44 *others were charged on an indictment with desertion from the service of their employer* R. *at the Table Bay Docks.*

It was proved in evidence before the Resident Magistrate that the prisoners had left the service together and at sunrise had gone on board the steamer which was to take them to E. *and on which they were discovered all together in the hold.*

On appeal *(upon the ground of gross irregularity in the proceedings) from the conviction of the Resident Magistrate,*

Held that *as the prisoners had all left the service together and were later found and arrested together and as the prisoners had suffered no special prejudice in all being joined in one indictment and no objection having been taken in the Court below the joinder in one indictment was not such a gross irregularity in the proceedings as to justify the conviction being quashed.*

This was an appeal from the conviction of the accused before the Resident Magistrate for the Cape on a charge of contravening the Masters and Servants Act, No. 18 of 1873, section 4 (clause 6) by deserting from the service of A. R. McKenzie & Co.

From the evidence before the Resident Magistrate it appeared that the accused (45 in number) were under contracts of service as dock labourers at the Alfred Docks, and that on the 5th of June, 1896, as none of them came to work, search was made and they were found in the hold of the Steamer *Donne Castle* on the day on which it was to leave for the coast ports.

The prisoners were charged before the Resident Magistrate on one indictment. The evidence as to the desertion was the same in regard to all the prisoners. They were tried jointly and convicted. Against this conviction appeal was now made on the ground that the prisoners ought to have been charged separately not jointly. This objection, however, had not been taken in the Magistrate's Court.

Mr. Graham, for the appellants.

Mr. Sheil, Assistant Law Adviser for the Crown.

Mr. Graham: The indictment ought to have charged them severally not jointly. The proceeding was a highly irregular one. The fact of their not having objected does not bar them. In *Queen* v. *Muller* (6, E D. C.), the accused consented to irregularity in procedure, yet the Court quashed the proceedings. In cases of this kind there is very serious prejudice in trying all together. *Queen* v. *April* (9 E.D., 177). We appeal under section 4 Act 21 of 1876.

Mr. Sheil: The only question is whether the desertion of this large body of men was due to preconcerted arrangement. If so, they committed the crime jointly and were properly joined. *Archbold* (21st Ed. p. 76). If prisoners had suffered any *prejudice* this would have been a jusitfiable objection. In *Muller's* case the Court held there was no evidence to convict on. *April's* case was a case of *perjury*, in which prisoners cannot be committed jointly.

Mr. Graham: Archbold's passage quoted is only a reference to single act committed by large number. These men could only have legally been charged together, if charged with conspiring. Each was convicted of separate act of his own.

Mr. Justice Buchanan said this case came on appeal on the ground of gross irregularity in the proceedings. There might have been more force in such a plea had each prisoner committed a separate crime, or committed a similar crime at a different time. In that case each prisoner might reasonably claim to be tried separately. In this case no objection was taken to the proceedure in the Court below, and it was admitted there was no prejudice sustained by the prisoners in being tried together. Had it been shown that this offence had been committed by different persons at different times, or that there was any special prejudice, the Court might have decided to quash the sentence. But in this case all the prisoners left their master at the same time, and were found together afterwards. He thought there had not been such gross irregularity in this case as to justify the Court in setting aside the proceedings. The sentence was said to be severe, but he did not think it was unduly severe. A man like Mr. Mackenzie, employing a large number of men at the Docks, might be very seriously inconvenienced by a gang of men like this leaving his employ. The appeal must be dismissed.

Mr. Justice Maasdorp concurred.

[Appellant's Attorney, D. Tennant, jun.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

MAGISTRATES' CASES REVIEWED.

Re STUURMAN AND OTHERS. { 1896. July 21st.

Mr. Justice Buchanan said this case had come before him for review of a sentence imposed by the Magistrate of Stellenbosch for the crime of contravening section 13 of Act 23 of 1888, in attempting to escape from gaol. The prisoner Stuurman pleaded guilty, and the other two prisoners not guilty. Stuurman, in a statement admitted he alone committed the offence. The other prisoners were in the same cell as Stuurman, and it is possible they might have availed themselves of Stuurman's work if he had been successful, but there was no evidence they had taken part in the attempt, on the contrary all the evidence was the other way. From a note on the record it would seem as if the Magistrate had decided on the strength of something he had heard; some statement not on oath before the Court. The conviction of Stuurman would be confirmed, and that of the other two quashed.

GENERAL MOTIONS.

HAUPT V. HAUPT.

Mr. Macgregor applied for leave to sue by edictal citation for divorce on the ground of adultery and ill-treatment by the respondent, for the custody of the children, for division of the estate, and an allowance for the maintenance of the children. The respondent, Mr. Pierre F. Haupt. late of Claremont, it was alleged had been married to applicant some years, and the issue from the marriage was six children, viz., four boys and two girls. The respondent left the Colony for Johannesburg some two years ago, and represented to his wife that he was there practising as a doctor, but the applicant knew that this must be incorrect, as he had no medical certificate. Some time afterwards, in May last, he returned to Cape Town with a woman named Steele, and stayed with her at a leading hotel. It was expected that the respondent would be returning to Cape Town soon, as he was known to have a return ticket.

Mr. Justice Buchanan said there appeared to be no great urgency if the respondent was expected to return shortly. The order would

be made, returnable on the 1st November, with leave to sue by edictal citation: personal service to be effected. Should personal service not be effected a fresh application could be made to the Court.

HILL V. COLONIAL GOVERNMENT. { 1896. July 21st.

Animals diseases—Rinderpest—Act 27 of 1893 section 12—Proclamation 154 of 1896—Spread of contagion—Dogs.

H., *with four pointer dogs crossed the Vaal River from Kimberley into Barkly West at a time when there were no restrictions on the passage of animals.*

Before his return the Colonial Government issued a proclamation in terms of section 12 Act 27 of 1893 prohibiting animals (including dogs) from being brought across the Vaal River.

The pointer dogs were accordingly detained by the Government Officials and H. *had to incur special expense for their maintenance and care.*

On an application to compel the Government to release the dogs on the ground that the proclamation was ultra vires *the Government,*

The Court held *that in view of the definition of "animal" in section 1 of Act 27 of 1893 the proclamation was* ultra vires *so far as regards dogs and ordered the release of applicant's dogs from detention.*

This was an application by Mr. J. A. Hill upon a notice of motion calling upon the respondent, Mr. P. H. Faure, Secretary for Agriculture, in his said capacity and as representing the Colonial Government, to show cause why the said Government, its officers and servants should not be restrained from interfering with the applicant in respect to the removal of certain four pointer dogs which the Colonial Government its officers and servants refused to permit the applicant to remove from the northern bank of the Vaal River or why the applicant should not have such other relief as may be meet.

Mr. Schreiner, Q.C., for the applicant.

Mr. Sheil, Assistant Law Adviser, for the Government.

The following was the applicant's petition:—

I, James Alfred Hill, make oath and say:

1. I reside in Kimberley in this colony.

2. At the end of April last, I went from Kimberley into the district of Barkly West, across the Vaal River, and took with me four pointer dogs, my property, which I used for the purposes of sport.

3. At the time I crossed into the said Barkly West District, no proclamation had been issued by His Excellency the Governor, prohibiting or stopping persons from conveying dogs across the river from the Barkly District to the Kimberley District.

4. On the 2nd day of May, I attempted to convey my said dogs across the Vaal River, from the district of Barkly, being on my way to Kimberley, but I was stopped by the police acting under and by virtue of Proclamation 154 of 1896.

5. I was obliged to leave my dogs in the district of Barkly West where they still remain. I have been put to considerable expense and inconvenience in being deprived of the use of my said dogs.

6. I have demanded from the Commissioner of Police of Kimberley permission to convey my said dogs across the Vaal River to Kimberley, as will appear from the letter hereunto annexed marked "A," but such permission has been refused as will appear on reference to letter hereunto annexed marked "B."

The letter of demand (marked "A") by Mr. Hill's attorneys was as follows:

We are instructed by Mr. J. A. Hill of this place to call upon you forthwith to allow him to bring across the Vaal River certain three pointer dogs, which have been illegally detained under orders from you since the 2nd May last.

Owing to the detention of these dogs, Mr. Hill has been put to the expense of paying a man specially to look after them and has also been put to extra expense for their keep. The amount paid to the man been £3 10s. 0d. per week, and the extra expense of the keep of the dogs has been 10s. per week. Mr. Hill holds the Government responsible to refund to him such amount, viz., £4 per week, since the 2nd May last.

To this the Commissioner of Police replied refusing the required permission in view of the provisions of the proclamation.

There was an affidavit by James William Crowhurst, of Cape Town, who said:

1. I am one of the Government Veterinary Surgeons and am well acquainted with the disease called Rinderpest which is about the most destructive and contagious cattle disease known to exist.

2. The germs of rinderpest are readily conveyed from one place to another by all animals, including dogs.

Mr. Schreiner: The Proclamation is under Act 27 of 1893. But see section 2 of that Act as to what "Animal" means. For the purpose of sections 3, 4, 5, 6 and 7 it includes dogs, but not for the rest of the Act. But these sections deal solely with the importation of dogs into colony. This is not a question of importation. The Proclamation is *ultra vires*—there is no provision in the Act which gives the Government the necessary power. Act 3 of 1893 deals with removal of dogs within the Colony.

Mr. Sheil: See section 12 of the Act under which the Proclamation was issued. Proclamation 154 specially mentions dogs. The widest possible construction as to the powers of the Government should be given in case of this deadly disease.

Mr. Justice Buchanan: The Act is an Animal Diseases Act, the term "animal" is defined in section 2 for the purposes of the Act.

Mr. Sheil: Yes, but section 12 refers to "any such animals as shall be named in the proclamation." The germs of rinderpest may be spread by dogs.

Mr. Justice Buchanan said that the Proclamation under which the respondents justified their acts was issued under the 12th section of the Animal Diseases Act, 1893, which authorised the Government to prohibit the removal of animals from an area within the Colony declared to be infected. The interpretation clause of the Act provided that the word "animal" shall, for the purposes of the Act, mean any horse, gelding, mare, mule, ass, bull, ox, cow, heifer, calf, sheep, goat, pig, or ostrich, and shall, for the purposes of sections 3, 4, 5, 6, and 7, include "dogs" and "cats." It will be seen that these sections named, 3 to 7, form Part I of the Act, and relate to animals imported from over the sea, or from some place beyond the Colony. The express inclusion of dogs for the purposes of these sections shows that the Legislature did not intend to include them under the term "animals" in regard to the other portions of the Act, which had reference to contagious diseases existing within the Colony. It may well be that contagious diseases may be spread by dogs, but the Act does not authorise the Governor to include them in a Proclamation which the Act defines shall apply only to certain specially named animals. If additional powers are needed the Legislature is now in session and can readily grant them. The Court however, cannot amend the Act. As to the application for compensation, there can be no order on a motion like this; but the rest of the application will be granted with costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Reid & Nephew.]

PEARCE V. CLAREMONT MUNICIPALITY AND OTHERS. } 1896. July 21st.

Municipal Council—Election—Nomination—Act 45 of 1882 section 49—Public notice—Mayor—Town Clerk—Gross irregularity—Ratification—Costs.

Vacancies having occurred in the Municipal Council of C., proceedings were taken under Act 45 of 1882 to fill up the vacancies.

The Town Clerk called for nominations by notice published once in a newspaper having a local circulation though apparently a smaller one than that of other newspapers also locally circulating. The publication in this newspaper was alleged to have been made in pursuance of a recent resolution of the Council to publish all its future notices therein. The notice was not posted up at the Municipal Office.

The Chairman of the Municipality first became aware of the notice (though signed by the Municipal Clerk "by order") in consequence of a telegram from the Municipal Clerk on the nomination day asking him to preside, which he did without protest, and he received the nominations made and delared the names of the candidates for election on the day of polling.

P. *and others claimed that the election should be stayed till fresh nominations could be sent in on the ground of gross irregularity, in that the Chairman of the Municipality had not authorised the issue of the notice nor was it properly published.*

Held *that though the proceedings were irregular they were not so grossly irregular as to justify the Court in setting aside the nominations.*

This was an application by Mr. Frederick Pearce of Claremont, upon notice of motion calling upon the Claremont Municipality, Sebastian V. Cloete, Charles Selwyn Powrie and Charles Robertson to show cause why the proceedings held by the Chairman of the Claremont Municipality on the 14th July, 1896, in connection with the nominations of candidates to fill the vacancies in the office of Municipal

Councillors for the said Municipality should not be set aside as being illegal and irregular on the grounds more fully set forth in the affidavit annexed, and also why the said respondents, shall not be ordered to pay the costs of this application.

Mr. Searle, Q.C., for the applicants.

Mr. Graham, for Mr. S. V. Cloete.

Mr. Schreiner, Q.C., for the Claremont Municipality.

The applicant made the following affidavit:

I, Frederick James Pearce of Claremont, make oath and say:—

1. That I am a landowner and ratepayer within the Claremont Municipality.

2. That it is my intention to nominate a candidate for election as a Municipal Councillor of the Claremont Municipality, and that I have for some time past been watching for the notice required under section 49 of Act 45 of 1882, under which the said Municipality is incorporated, so as to be prepared to hand in my nomination paper, and the first intimation I received that any such notice had been advertised was on the 14th inst., when the annexed cutting marked "A" taken from a paper called "The South African Telegraph," appearing in the issue of the 8th inst., was brought to my knowledge and this was only after the nomination of candidates had already taken place.

3. I say that the said notice only appeared once in the said newspaper and in no other paper circulating in the neighbourhood, and further that the said notice was issued without the knowledge, sanction or consent of the chairman of the said Municipality, and it was not given by legal authority.

4. I say further that the Chairman of the Municipality first became aware of the said notice when he received a telegram from the Municipal Clerk requesting him to attend for the purpose of announcing the nominations of candidates as provided by section 54 of the said Act.

5. The said notice was designedly inserted in the "South African Telegraph" so as to avoid the publicity which it demanded and so as to prevent other candidates from being nominated; hitherto it has been the practice to advertise such notice freely in the "Cape Times" and "Cape Argus" and "Wynberg Times" besides posting same at the Municipal Office, which course has on this occasion been studiously avoided.

The notice referred to in Mr. Pearce's affidavit and published in the "South African Telegraph" was as follows

"CLAREMONT MUNICIPALITY."

Notice is hereby given, in terms of Act 45 of 1882, that nomination papers will be received by the Chairman of the above Municipality, at the Municipal Hall, Claremont, on Monday the 13th July, 1896, for candidates to fill the offices of Councillors in vacancies caused by the retirement, by rotation, of the following Councillors, in accordance with section 20, of Act 45 of 1882, viz.:—Charles Selwyn Powrie and John Henry Wood, Esq., and that the nomination of such candidates will take place at 12 o'clock noon, at the said place, on the day following thereafter.

Also, at the same time and place, nomination papers will be received for two auditors for the ensuing year.

By order,
J. S. MERRINGTON,
Municipal Clerk.

The Municipal Clerk made the following affidavit:

1. That I am the Municipal Clerk to the Claremont Municipality and as usual gave public notice through the medium of a daily paper circulating in the district stating the day on which nomination papers would be received at the Municipal Office for candidates to fill the vacancies caused by the retirement by rotation of the following councillors, viz: Charles Selwyn Powrie and John Henry Wood, also for two auditors for the ensuing year. The nomination papers having been duly handed in at the Municipal Office in terms of the public notice given on the 8th July, 1896, and as I did not see the Mayor on the 13th July, I sent a letter to him on the 14th July requesting him to come to the Municipal Hall, Claremont, to declare the nominations. On the arrival of the Mayor at the Municipal Office the nomination papers were handed to him. After having read them he asked whether the Act had been complied with, whereupon the advertisement in the "South African Telegraph" was pointed out to him. He looked at it and he then remarked "Oh, that is all right." He then went outside the municipal door and read out the nominations in public with a loud voice All these proceedings on the part of the Mayor were witnessed by Messrs. Powrie, Hiddingh, Cloete and myself.

2. That my action was perfectly *bona fide* and to the best of my belief entirely in accord with the requirements of Act 45, 1882—sections 20 and 49.

3. That there was no design whatever on my part to avoid giving sufficient publicity to the advertisement in the "South African Telegraph" of July 8th as alleged, and I fully

believe its circulation to be large enough to post everybody in the community on the subject.

4. That ever since the existence of the "South African Telegraph" the Claremont Municipal Council has given this paper most of, if not all, its advertisements and by resolution of the Council passed in or about the month of April last it was resolved to advertise all notices in the "South African Telegraph."

5. I also swear that during my Secretaryship to the Claremont Municipality the notice calling for nominations has never been posted up outside the Municipal Office but the names of those who had been nominated were only posted up after the nominations had been declared.

Mr. Henry Knight Tredgold, Mayor of the Claremont Municipal Council, in an affidavit, declared, that "the allegations contained in the first paragraph of the affidavit of J. S. Merrington to the effect that notice was sent to me to attend at the Municipal Hall to declare the nominations and that I did, after having been shown the notice in the paper, so declare them, are true and correct."

There were also affidavits by Mr. Edward Ridge Syfret and Mr. Murdock Morison Tait as follows:—

1. That we intended standing as Councillors for the Claremont Municipality and had made all arrangements for our nominations and were only awaiting the publication of the notice under section 49 of Act 45 of 1882, and had we seen this notice our nominations would have been duly secured.

2. That last year the notice calling for nominations was advertised 12 days before the date fixed for nominations, and appeared four times in the "Cape Argus."

Mr. George Griffith Rowland of Mowbray also lodged an affidavit as follows:—

1. I was the agent for E. R. Syfret and M. M. Tait in connection with their election as Councillors for the Claremont Municipality.

2. I was keeping a watch in the papers for the notice calling for nominations and on two occasions I called personally at the Claremont Municipal Office for the purpose of ascertaining when nominations were to be received. I called on the 6th and 8th inst., during office hours, but could get no information as the secretary was out.

3. I have perused the affidavit of John Samuel Merrington sworn to on 20th inst. With regard to paragraph 5 thereof, I say that I have personally seen notices calling for nominations posted up at the Municipal Council Office in years past.

4. I have been acting as an election agent for ten years past and have always waited for the notices to appear in the "Times" and "Argus" and have then proceeded with securing nominations for my principals

In a further affidavit Mr. Tredgold stated:

1. That I am the Chairman of the Claremont Municipality.

2. I have seen the notice in the "South African Telegraph" of the 8th instant in connection with the nomination of candidates as councillors for the said Municipality. I first became aware of such notice on the 14th inst., when I received a telegram from the Municipal Clerk requesting my attendance to do the duties of returning officer in connection with the nomination of candidates in terms of the said notice.

3. This notice was not issued with my knowledge, sanction or approval, nor was I in any way consulted in regard thereto; had I been, I should have caused the same to be fully and duly advertised in the "Cape Times" and "Cape Argus," and have made the same as public as possible.

4. I consider the whole of the proceedings under the said notice to be illegal and irregular and a deliberate attempt to prevent some of the candidates for the election to take place next month from securing nominations.

Mr. Cloete, one of the respondents, stated in an affidavit:

I. That I am a landowner and ratepayer within the Claremont Municipality.

2. That I am one of the above-named respondents and have perused the affidavit, notice and annexure of the above applicant.

3. That I was requested some weeks ago by some influential ratepayers of Claremont to allow myself to be nominated for election as a Municipal Councillor of the Claremont Municipality at the forthcoming Municipal election, and that in accordance with such request I allowed myself to be nominated.

4. That I am informed and verily believe that notice was given by the Municipal Clerk in accordance with the Act 45 of 1882, but whether the proceedings have been irregular or not, I am not prepared to say, as I never took further interest in the matter and therefore cannot say whether the statements and allegations contained in the applicant's affidavit are true and correct.

5. That I consider I am not a party in these proceedings as I took no part whatever in the carrying out of the matters or things complained

of and therefore ask this Honourable Court to order that my name be struck out of the proceedings and that I may obtain costs against the applicant.

After some argument Mr. Searle applied under Rule 335 for the evidence of Mr. Tredgold to be heard.

Mr. Justice Buchanan said he should like to hear something more from Mr. Tredgold, the Mayor, also Mr. Merrington. He was not quite satisfied with Mr. Merrington's statement.

Mr. Searle said Mr. Tredgold was present, and could give evidence, but that Mr. Merrington's duties prevented him from attending. If the Court, however, desired him to appear they could secure his presence if the motion were adjourned.

Mr. H. K. Tredgold, Mayor of Claremont, was called and examined by Mr. Searle. He said he was first aware of the notice on his attention being drawn to it by the secretary. He had given no authority to the Municipal Secretary to put the notice in the paper. If he had authorised the notice he would have taken care to have given it more publicity. He did not consider sufficient notice was given. He would have put the notice into papers which were more genera ly circulated than the "South African Telegraph." He did not know if he would have put the notice in more than once. He would have given a longer time, say, eight days at least. He would have inserted it at least in the "Times" or "Argus."

Cross-examined by Mr. Schreiner: He thought the other papers, "Times" and "Argus," had a larger circulation than the "Telegraph." He did not think so many people saw the "Telegraph." He saw something supposed to be a notice, which was shown him by the secretary, though he thought it might have been put in better form. He however, took it to be all right, and sanctioned the nominations. He did not raise any objection to the secretary's action. His own action might be construed as giving approval to the secretary. Some months ago heavy bills came in for advertising and the Council complained of the expense. He had been Mayor for three months, succeeding Mr. Hiddingh. It was usual, he believed, for Mayors to leave matters of detail to the secretary. He did not interfere with the secretary on minor financial matters.

Mr. Searle, for the applicant, said: The application is on the ground that the proceedings were irregular, the procedure is regulated by Act 45 of 1882, section 49. Clearly the Act was not complied with originally. For by the Act this notice was to be given in a certain way, and by a certain person, *i.e.*, the Mayor. But the Mayor knew nothing; though the notice was signed "by order" he never gave the instructions or delegated authority to instruct. The real point is, could the illegal informal notice thereafter be ratified by the Mayor. He could not ratify—as against the rights of the ratepayers. The amount of notice given was not the point—even though the time was short and the notice was not posted up. Public notice was given, but not by the proper person.

Mr. Justice Maasdorp: Unless an act is void or illegal it can be ratified as a rule.

Mr. Searle: We contend that the act *is* void. The clerk had no authority to do what he did. Sections 161 and 165 of Act 45 of 1882, show what the Act means by public notice.

Mr. Justice Buchanan: But what steps could be taken now in view of the period mentioned in section 49 of the Act?

Mr. Searle: We only ask to set aside the present election. The point as to how the further proceedings are to take place is not in question and is not necessary for us to consider.

Mr. Schreiner, for the respondent Municipality, said: There was a standing order in the Council to advertise in the "South African Telegraph." The petitioners have not shown any real grievance—the only thing is a technical objection as to the inserting the advertisement "by order" when there was no previous authority. It cannot be denied that the Mayor might delegate his power in this respect.

Mr. Justice Buchanan: I am not satisfied with Mr. Merrington's explanation as to how he came to insert the notice at all.

Mr. Schreiner: The provisions of the Act as to instructions by the Mayor are directory. There is no penalty attached: he could delegate, he could also ratify. It must not be ignored also the persons duly nominated have their rights.

Mr. Justice Maasdorp: Supposing the Mayor knew nothing at all—would the parties be prejudiced if they never turned up at the election and took no notice at all.

Mr. Schreiner: That would have to be proved.

Mr. Searle: The Mayor has to fix the date of nomination under the Act. Yet the Mayor knows nothing till the day he is called out from Town for the nomination. See also section 73 of the Act. As to our claim for costs against Mr. Cloete—that was a mistake—and we can't decline to pay his costs of appearance as they were necessitated by the form of motion.

Mr. Justice Buchanan said there was no doubt there had been irregularity in this case, but the question was whether there had been such gross

irregularity as to justify the Court in setting aside the proceedings. Under section 49 of Act 45 of 1882 notice had to be given by the Mayor, specifying the day of nomination. In this case the notice was given in due form, signed by the Town Clerk "by order." It appears now as a matter of fact, that the Mayor did not previously order the notice, but he afterwards adopted it, and accepted it as though authorised by him. No objection was taken to the form of the notice, and the applicant admitted that if it had been seen by him he would have acted upon it. Other candidates saw the notice and acted upon it. His Lordship thought it was competent for the Mayor to direct the Town Clerk, who was the executive officer of the Municipality, to give required notices. There was no prejudice to candidates from the fact that the notice was afterwards ratified instead of being previously authorised by the Mayor. The Mayor was a legal gentleman, and would probably not have ratified the notice if he had any good grounds of objection. The main objection the applicant had was that he did not see the notice. But it appears that some time before the Council had by resolution adopted a certain newspaper circulating in the municipality as the medium for all their notices, and that this notice was duly published in the ordinary course in that newspaper. Publicity in more newspapers might have ensured the applicant seeing the notice, but there is no irregularity in publishing it in the medium usually adopted for municipal notices. The Secretary of the municipality was not made a party to these proceedings, nor had he explained his conduct in several of the particulars challenged, though it was his acts that had given rise to these proceedings. The application would be refused, but no order would be made as to costs, seeing there had been irregularities, and the questionable acts of the municipal officer had not been explained. As to Mr. Cloete's costs, the applicant must pay them, as Mr. Cloete had acted within his rights and had done nothing irregular. Indeed it did not seem necessary to have made him a party to the application.

Mr. Justice Maasdorp concurred.

[Applicant's Attorney, Gus. Trollip; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and Hon. Mr. Justice MAASDORP.]

ILLIQUID ROLL.

ERASMUS V. MCCALLUM. { 1896, Aug. 1st.

Mr. Benjamin applied for judgment under rule 329 for £301 10s., for work and material supplied.

Granted.

MURISON V. ROSS.

Mr. Buchanan applied for judgment under rule 329 for a sum of £86 8s. 2d., money lent and interest, less £17 paid on account.

Granted.

TROLLIP V. SCOTT.

Mr. Close applied for judgment under rule 329 for £48 8s. 6d., balance of account for professional services.

Granted.

COLONIAL GOVERNMENT V. JAN L. KOTZE.

Mr. Sheil applied for jud ment under rule 329 in terms of summons.

Granted.

COLONIAL GOVERNMENT V. JOHANNES J. KOTZE.

Mr. Sheil applied for judgment under rule 329 in terms of summons.

Granted.

COLONIAL GOVERNMENT V. TOBUJA.

Mr. Sheil applied for judgment under rule 329 in terms of summons.

Granted.

VAN DER MERWE V. THERON.

Mr. Molteno applied for judgment under rule 329.

Mr. Maclachlan appeared for the defendant.

Mr. Molteno objected to defendant's appearance on the ground that he was barred.

Mr. Maclachlan stated that the plea was tendered at the Registrar's office about five minutes after the defendant had been barred.

The Court decided to make no order on condition that the defendant paid the costs of the day; defendant's counsel to be allowed to apply to the Court to remove the bar.

GORDON AND GOTCH V. SIMON.

Mr. Close applied for judgment under rule 329 for £42 13s. 9d. for goods sold and delivered.

Granted.

REHABILITATIONS.

Re HELENA KINGSLEY.

On the application of Mr. Jones, Helena Kingsley was rehabilitated.

Re EMILE OTTO ERNEST WIRTH.

On the application of Mr. Buchanan, Emile Otto Ernest Wirth was rehabilitated.

Re QUENTIN CAMPBELL.

On the application of Mr. Benjamin, Quentin Campbell was rehabilitated.

Re GEORGE ALEXANDER ORSMOND.

On the application of Mr. Maskew, George Alexander Orsmond was rehabilitated.

Re JURIE WYNAND FOURIE.

On the application of Mr. Maskew, Jurie Wynand Fourie was rehabilitated.

Re CORNELIS JOHANNES MARTHINUS DE WET.

On the application of Mr. Jones, Cornelis Johannes Marthinus de Wet was rehabilitated.

GENERAL MOTIONS.

WYLIE V. WYLIE.

Mr. Sheil, who appeared for the original plaintiff Mr. Wylie, applied for the Court to fix a day for the further hearing of this case, part heard last term.

Mr. Graham appeared for the original defendant, Mrs. Wylie.

The Court fixed Tuesday next for the resumption of the hearing of the case.

SMITH V. SMITH.

Mr. Jones moved to make absolute the rule *nisi* dissolving the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of conjugal rights, and for an order declaring her to have forfeited all benefits derived from the marriage in community.

The rule was made absolute, and the order granted as prayed.

IN THE ESTATE OF THE LATE RUDOLPH P. COETZER.

Mr. Jones applied for an order ratifying the sale by the widow of certain two farms, the property of the estate, situated in the division of Graaff-Reinet, and known as Modderkraal and Wolven Kloof, by private contract instead of by public auction as directed by this Court, the offers made at the latter not being sufficient to justify a sale.

The application was granted.

THE PETITION OF GEORGE F. W. KETT.

Mr. Close applied for leave to sue by edictal citation in an action against plaintiff's wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion.

The application was postponed for amendment of the petition by a statement as to the domicile of the plaintiff.

IN THE INSOLVENT ESTATE OF THE LATE PAULUS J. VERDOES.

Mr. Buchanan applied for a further period of twelve months to be allowed to the trustee within which to file his account, it being desired to postpone the sale of the landed property, virtually the sole asset of the said estate, until a more favourable opportunity.

Mr. Benjamin appeared to oppose.

The Court ordered a postponement until 1st May, to enable the trustee to file his account, the costs of the application to come out of the estate. In regard to the costs of the postponement, as one creditor chose to ask for postponement, and could not to-day show any cause he must bear the costs caused by the opposition.

IN THE ESTATE OF THE LATE HEINRICH F. C. EGGERSGLUSS.

Mr. Graham applied for authority to the executrix testamentary to transfer to her present husband certain land described as lot No. 65 in the Kwelna location, district of East London, the purchase price of which with expenses has been paid by him and the said executrix out of their own funds, though the title deed is in favour of the representatives of her said late husband, a sum having been agreed upon at which it is to be taken over.

The application was granted.

IN THE ESTATE OF THE LATE FREDRICH SCHIFFMAN.

Mr. Maskew applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act, for transfer to the said estate of certain lot of ground marked No. 7, at Papendorp, being part of the divided estate Altona, purchased from the assigned estate of Henry Wilson, but never transferred.

The application was granted.

THE PETITION OF SOLOMON J. POGGENPOEL.

Mr. Graham applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of certain lot of ground marked No. 45 in the village of Williston, purchased by him from Christina G. Smit, but never transferred, her whereabouts and those of previous owners being unknown.

The application was granted.

IN THE ESTATE OF THE LATE JOHN OXER.

Mr. Benjamin applied for an order relieving Joseph Graham from his trust as executor dative of the said estate, as by reason of his absence from the Colony, ill health, and advanced age, he is unable to attend to the same.

An order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE JOHN FROST.

Mr. Benjamin applied for an order authorising the executrix testamentary to sell certain lot of ground, with a cottage thereon, situated at Port Elizabeth, the building being in a ruinous state and burdened with arrear taxes, and all the persons interested having agreed to the sale.

An order was granted in terms of the Master's report. The proceeds to be distributed in terms of the will; costs to come out of the proceeds.

THE PETITION OF LOUISA WILLIAMS.

Mr. Smuts applied for authority to petitioner (married in community of property) to transfer certain two lots of ground situated on the Hill at Port Elizabeth (purchased by her out of her earnings) without the assistance of her husband, whose whereabouts are unknown, and whom she has not seen since 1881, when he was sentenced to five years' imprisonment for assault.

The Court granted an order; notification to be made in the "Government Gazette" that unless cause to the contrary is shown by the last day of the term the Court will grant leave to the petitioner to sell and transfer the property standing in her name without the assistance of her husband, and also calling upon him to show cause why she should not be allowed to retain the proceeds of the property for her maintenance and support.

IN THE MATTER OF THE MINOR JONES.

Mr. Molteno applied for authority to the father to pay out of the proceeds of the sale of his farm Bellevue, situated in the district of Stellenbosch, certain sums of money advanced by the minor's mother for carrying out certain repairs and improvements on the property, and also an amount paid into the Guardians' Fund to the credit of the minor in respect of the said farm.

An order was made in the terms of the Master's report, the matter being referred back to the Master on the question of items for repairs.

IN THE MATTER OF THE MINORS SCHMIDT.

Mr. Buchanan applied for confirmation of the purchase on behalf of the said minors of the premises known as the Victoria West Hotel, it being the intention of their mother and her present husband to carry on the business for the purpose of maintaining the minors and securing them the benefits under their father's will.

An order was granted in terms of the Master's report, leaving the question raised in the last paragraph open.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

SETTING DOWN OF CASES. { 1896. Aug. 4th.

Prior to commencing the business of the day,

The Acting Chief Justice said that owing to the exigencies of circuit the full Court would be unable to sit after term; therefore practitioners who wished their cases to be heard must have them set down in good time.

WYLIE V. WYLIE.

The hearing of this case was resumed (for report of first portion of case, see VI. Sheil, page 213).

Mr. Graham appeared for the plaintiff in reconvention.

Mr. Sheil, for the defendant in reconvention, said that he submitted to the judgment of the Court, and that it was not intended to call further evidence.

Mr. Graham addressed the Court, urging that Mrs. Wylie should have the custody of the eldest boy.

The Acting Chief Justice: This is an action originally brought by the plaintiff, the husband, for restitution of conjugal rights, or failing which a decree of divorce dissolving the marriage subsisting between himself and the defendant, for the custody of the children of the marriage, and for an order that the defendant be declared to forfeit all benefits conferred upon her by the ante-nuptial contract. The defendant pleaded gross violence on the part of the plaintiff; that the plaintiff was dishonest, was of extravagant habits, and that since 1891 he had been in financial difficulties, and was unable to support the defendant and her children; that she had since that date been compelled to rely upon her own exertions for support, and that he was not at present in a position to support her and her children, and that, therefore, it was impossible to live with him. She also claimed in reconvention a degree of judicial separation, alimony, and custody of the children of the marriage. When the matter came before the Court on the last occasion the full Court unanimously gave judgment against the plaintiff on his declaration, and held that the defendant had amply justified her conduct. At the hearing of the case the Court was prepared to give judgment on both the claim in convention and in reconvention, but as Mr. Wylie then alleged that he could rebut the statements of defendant's witnesses the Court resolved—as he was not represented by counsel—to give him an opportunity of so doing. He has had that opportunity, but has not brought any further evidence so that the case stands now as it did then. The Court is now, as then, of opinion that Mrs. Wylie has fully established her claim to a separation. She has established her allegation of gross cruelty on the part of her husband; also his intemperate and extravagant habits. As to the question of dishonesty I do not like to say anything, as the evidence is more of a negative than a positive character. The plaintiff's conduct since he has been in Cape Town, in living on his wife instead of attempting to support her, and in spending the money that he got hold of (including money earned by his wife, or borrowed in her name), on himself, and his drinking habits are sufficient to justify the Court in saying that he is not a fit person to have the custody of the young children of the marriage, especially the girls. But the boy, who is fourteen years of age, and earns his own living, stands in a somewhat different position. At present the custody of the boy will be given to the father, reserving to Mrs. Wylie full right of access to the child at all reasonable times, and also the right to apply to the Court again—if Mr. Wylie misconducts himself—to have the custody of the boy transferred to her. There will therefore be judgment for the defendant (the plaintiff in reconvention) as prayed with costs, except that the father at present is to have the custody of the eldest boy.

[Plaintiff in person; Defendant's Attorney C. C. Silberbauer.]

IN THE INSOLVENT ESTATE GEORGE E. MANDY.

Mr. Sheil applied on behalf of the Master of the Supreme Court for an order requiring the trustee of the said estate to forthwith file the liquidation account and plan of distribution required by section 108 of the Insolvent Ordinance, and directing him personally to pay the costs of this application.

Mr. Molteno appeared for the respondent, the trustee.

After argument,

The Acting Chief Justice: The law requires the Master to call upon all trustees to file accounts supported by proper vouchers. In this case the trustee has tendered an account, but with improper vouchers. The trustee must answer to the Master. The usual order must be granted, with costs *de bonis propriis*.

SAUER V. CIVIL COMMISSIONER, CAPE. { 1896. Aug. 4th.

Transfer duty—Act 10 of 1896.

S. *purchased certain land in the Cape Division, the contract of sale being completed prior to the promulgation of the Transfer Duty Amendment Act, No. 10 of 1896.*

Subsequent to the promulgation S. *tendered payment of transfer duty, fine, &c., calculated upon the basis of the decreased rate (2 per cent.) payable under Act 10 of 1896: but the Civil Commissioner refused to accept this.*

Held that *as the sale was concluded prior to the promulgation of Act 10 of 1896, the duty payable must be reckoned as provided in Act 5 of 1884*, i.e., *at the former rate of 4 per cent.*

This was an application upon motion calling upon the Civil Commissioner, Cape, to show cause, if any, why he should not be ordered to receive from the applicant the sum of £70 4s. 3d. tendered to him as and for the transfer duty and fine payable by the applicant for and in respect of the purchase by him of certain property situate at Wynberg, known as "Indian Cottage," from the estate of the late Edward Dwyer, and why he should not further be ordered to grant a receipt for the said transfer duty in terms of sections 9 and 10 of Act 5 of 1884. And why he should not be ordered to pay the costs of this application.

Mr. Henry Thomas Standen, one of the partners of the firm of Sauer & Standen, attorneys of the above-named Honourable Court, made the following affidavit:

1. That on the 23rd day of July instant, I wrote and delivered to the respondent the letters, a copy of which is hereunto annexed and marked "A."

2. That in reply thereto I received the letters hereunto annexed marked "B."

A.

Re Transfer duty J. W. Sauer on property purchased from estate of the late Edward Dwyer.

Enclosed please find:

1. Declaration of purchaser made by Mr. Sauer.

2. Our cheque for £70 4s. 3d., in payment of the duty on the purchase amount of the above property reckoned at the rate of 2 per cent., and fine amounting to 4s. 3d.

Kindly grant the usual deposit receipt for the duty and fine.

B.

Tender of transfer duty at 2 per cent., on property sold 16th January, 1896, £70 4s. 3d., sterling.

I have the honour to acknowledge the receipt of your letter of 23rd current on the above subject, enclosing a declaration of purchaser made by Mr. J. W. Sauer in connection with the purchase by him on the 16th January last of the property at Wynberg known as the "Indian Cottage" together with your cheque for £70 4s. 3d. sterling in tender of the transfer duty, &c., at two pounds sterling per centum (£2 per cent. sterling) in terms of the Transfer Duty Amendment Act, No. 10 of 1896, and in reply I am directed to inform you that your tender of payment cannot be accepted, as the sale was concluded prior to the taking effect of the above-quoted Act, and that the duty accordingly required to be paid at the rate of four pounds sterling per centum (£4 per cent.) together with the accrued fine.

The enclosures to your letter are herewith returned.

Mr. Searle, Q.C., for the applicant.

Mr. Sheil for the respondent.

Mr. Searle: The application is based on the words in Act 10 of 1896, "sold, alienated, *or transferred.*" Now transfer means transfer *coram lege loci*, and therefore the word "transfer" in Act 10 of 1896 means before the Registrar. If Act 5 of 1884 be looked to, it will be clearly seen what each of the words—"*sold*, otherwise *alienated* or *transferred*"—has special reference to, *e.g.*, section 1, *sold, i.e.*, to purchaser; section 2, *alienated, i.e.*, to donee, legatee, &c.; section 3, *transferred, i.e.*, to person in whose name the property is registered. See also Ordinance 2 of 1844, and other Acts lowering or raising the duty, *e.g.*, Act 6 of 1857, Act 7 of 1858. Act 7 of 1858, section 3 put other "alienations" on same footing as sale.

Mr. Justice Maasdorp: Act 25 of 1861, section 6, fixes the sale date as the date from which duty accrues.

Mr. Searle: Act 11 of 1863 in section 2 establishes the 4 per cent. duty on property sold after the taking effect of the Act—section 3 putting "other alienations" on same footing as sale. Previous Acts dealt only with two classes of transactions—sale and exchange. Act 5 of 1884 again took over the words, "or otherwise alienates," and the Act of 1896 also took them over and must have the same meaning. In the Act of 1884 the word *transferred* clearly means, as usual, the transfer before the Registrar of Deeds. The Act is clumsily worded—but evidently means to cover cases like this where property is sold before the Act and transferred afterwards.

Mr. Justice Maasdorp; If the Government took judgment against a man for arrear transfer duty, and the Act was passed, how would he pay—on the judgment or the lesser amount?

Mr. Justice Solomon: Your argument would place the man who pays duty at once in worse position than the dilatory payer.

Mr. Searle: Yes, but he would have to make it up in fines. All the other Acts only used the words "sale"—or alienation; the latter covering all such cases as gift or inheritance. Act 5 of 1884 added "or transferred" and the Act of 1896 took it over,

Mr. Sheil not called on.

The application was refused.

The Acting Chief Justice: This is an application for an order to compel the Civil Commissioner of the Cape to receive transfer duty at the rate of two per cent. upon a contract sale of landed property, which took place prior to the passing of Act No. 10, 1896. The Civil Commissioner contends that as at the date of the sale Act No. 5 of 1884 was in force duty must be paid at the rate of four per cent., as fixed by that Act. The application is based altogether upon the use of the word "transferred" in the Act of 1896. This, however, is not a "transfer" but a payment of duty upon a "sale." The words used in the Act of this year are the same as those contained in Act No. 5, 1884, the second section of which imposes a duty of four per centum upon the purchase price or value of landed property sold, or otherwise alienated, or transferred; and the section goes on to show why these three terms are used. The term sale refers to the first sub-section which makes the duty payable by the purchaser of the property. That is the sub-section under which this case comes. Alienation refers to duty payable by every person becoming entitled to property by way of exchange, donation, inheritance &c, or in any manner otherwise than through the medium or by means of purchase and sale. The third sub-section shows why the term "transferred" is used, as the duty is there imposed on any person into whose name any property registered in the name of any other person shall be registered or transferred. This is a sort of general sweeping clause intended to include all changes of ownership not before specified. All the Act of 1896 does is to reduce the duty in these several cases to two per centum on transactions entered into after the taking effect of that Act, and I see the date of promulgation of the Act is the 19th June last. This is long after the date of the sale now under consideration. The application must therefore, in my opinion, be refused.

Mr. Justice Solomon: The language of section 1 of Act 10 of 1896 is not very well chosen, and if that Act stood alone its construction might present some difficulty. The words "sold, or otherwise alienated or transferred," are, however, taken over from section 2 of Act 5 of 1884, and if Act 10 of 1896 is read as one with Act 5 of 1884 the meaning of the Legislature seems to me quite clear. Under Act 5 of 1884 a duty called "transfer duty" is payable in respect of three distinct sets of transactions, viz: 1. By the purchase of landed property. 2. By every person becoming entitled to any such property by any act of exchange, donation, &c. 3. By every person into whose name any such property registered in the Deeds Registry of the Colony in the name of any other person shall be registered or transferred. These three sets of transactions correspond respectively to the words "sold, or otherwise alienated or transferred." Where then land is sold as in the present case duty has to be paid by the purchaser apart altogether from any question of the transfer in the Deeds Office, and such duty is payable within six months from the day of the date of the sale. It is upon the contract of sale, not upon the transfer that the duty becomes payable. The only alteration made by Act 10 of 1896 is to reduce the duty from 4 per cent. to 2 per cent., upon the purchase price in respect of any property sold after the taking effect of that Act. The only question, therefore, is whether this land was sold before or after the taking effect of that Act. It is clear that it was sold before, and consequently a duty of 4 per cent. is payable in terms of Act 5 of 1884.

Mr. Justice Maasdorp concurred.

[Applicant's Attorneys, Messrs. Sauer & Standen; Respondent's Attorneys, Messrs. Reid & Nephew.]

VAN DER MERWE v. THERON. { 1896. Aug. 4th,

Procedure—Purging default—Bar of plea—Rule 319.

This case was first set down for the 1st August for judgment under Rule 319.

Mr. Molteno applied for judgment on behalf of plaintiff.

Mr. McLachlan appeared to oppose on behalf of defendant.

Plaintiff's counsel objected to Mr. McLachlan being heard, as defendant had been barred for default of plea.

The Court pointed out that formal application for the removal of bar must be made before counsel could be heard to oppose, and with the consent of plaintiff the case stood over till the 4th August.

On that date,

Mr. McLachlan, on behalf of defendant, applied for leave to purge his default, and to plead to the plaintiff's declaration.

Mr. Molteno, for plaintiff, objected, on the ground that ample time had been allowed, and that the defence was not a *bona fide* one. He cited *Levin* v. *Greeff* (3 Sheil, 123).

The application was refused.

The Acting Chief Justice: The defendant did not file his plea within the proper time, and so was barred. The defendant now applied to have this bar removed and for leave to plead. The Court is always willing to help the defendant where there is reasonable defence, but in this case there is nothing whatever to show that the defendant has any defence. The defendant sets up a collateral agreement, which may be the ground for a future action if he can establish it; but the Court will not remove the bar in this case, and the application must be refused with costs.

Mr. Molteno thereupon applied under rule 319 for judgment against defendant for transfer of farm Essenbosch.

This application was granted with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorney, H. P. du Prees.]

REGINA v. OTTO. } 1896. Aug. 4th.

Liquor licence—Act 28 of 1883, section 73 (clause 1)—Permitting drunkenness—Knowledge of barman.

A. *was found lying drunk in* O 's *canteen. The evidence showed that the room was full of people and that the barman on having his attention expressly called to* A. *was taking steps to eject him when he discovered that* A. *was in charge of the police.*

O. *was convicted on a charge of "permitting drunkenness" on his licensed premises. On appeal,*

The Court held *that "permitting drunkenness" implies actual or constructive knowledge on the part of the licensee or his barman, and as the Magistrate did not find nor was there any evidence of such knowledge on the part of either, ordered the conviction to be quashed.*

This was an appeal from the conviction of the accused before the Resident Magistrate, Worcester.

Mr. Innes, Q.C., for the appellant.

Mr. Sheil (Assistant Law Adviser) for the Crown.

The summons to appear before the Resident Magistrate set forth that Carl F. Willem Otto is guilty of contravening clause 1, section 73 of Act 28 of 1883, in that he wrongfully and unlawfully did on or about the 27th June, 1896, and at Worcester, permit drunkenness to take place on his premises by allowing one Arend Lambert to lie down drunk in his canteen on the above-mentioned premises.

The prisoner, before the Magistrate pleaded not guilty, and specially that the mere fact of a person having been found in a state of intoxication on the licensed premises does not in itself constitute a contravention of the Liquor Act by the licensed dealer; inasmuch as the expression "permitting drunkenness to take place" contemplates:

1. The knowledge that such drunkenness was taking place, and allowing it so to continue to take place.

2. That more persons than one were wantonly suffered to become drunk; or, that the licensed dealer conducted his business generally in a loose manner, and was in the habit of allowing a person or persons to become drunk there.

From the evidence it appeared that the constable found one Arend Lambert lying drunk on the floor inside a canteen belonging to the accused. He was lying close to the door. It was a Saturday night and the room (which was in charge of a barman) was fairly full, the customers (about twenty-five to thirty-five) "standing thickly in front of the counter." The constable who removed Lambert "could not see the barman from the door—there were too many people." Lambert stated that he was under the influence of liquor when he went to the canteen. The barman "had been a policeman for over fifteen years, and knew what a barman should do when a case of drunkenness arises." He denied having served Lambert with liquor that evening. One Barend swore that as soon as Lambert fell down the barman was informed, and he immediately came round to Lambert, whom however he found to be in charge of the police; though it was some time thereafter before Lambert was removed. This was corroborated by defendant, who stated that he and his barman were proceeding to put Lambert out when they found this to be the case.

During the hearing of this case the records in the case of the conviction of Lambert for drunkenness on the occasion in question were read under protest from defendant's agent The Resident Magistrate found the accused guilty, and fined him £5 or fourteen days' imprisonment. Against this conviction the appeal was now brought.

Mr. Innes: Knowledge must be proved before a man can be said to permit. Section 78 gives a remedy to holders of licence—to turn off drunken persons from the premises, that presuming however also that he knows of the drunkenness. There is no proof that the man got drunk on

the premises. . . . . The section in the English Statute is worded in the same way as ours—the offence is the "permitting." *Somerset* v. *Hart* (12 Q.B., 360); *Somerset* v. *Wade* (The Reports, vol. 10, Q.B., p. 105). The Resident Magistrate does not find that the barman knew the drunken man was there. The size of the room was about 15 x 13 feet. There seem to have been about thirty people there. The Resident Magistrate only finds he was there five minutes. The Resident Magistrate moreover allowed other matters to influence his mind than the mere fact of the drunkenness. He put questions to the barman as to whether he gave credit for drink, and irregularly read over to one of the witnesses evidence taken in another examination.

Mr. Sheil: The Resident Magistrate does not state specifically that the barman knew, but it is clear as a result of his finding that he must have held it so. Question is, must the barman have known, or could he have known? The canteen was crowded, but in **Queen* v. *Robertson* (2 Sheil, 235), it was held that the mere fact of a licensee being very busy serving did not absolve him from liability. The room being so small the barman most probably must have seen. The defence is not a proper one—if the canteen is regularly crowded the owner should have taken pains to check any misbehaviour. Why didn't the barman turn him out under the 78th section or give him in charge? The Resident Magistrate had sufficient evidence to justify him in finding the barman must have known. It is a question of credibility.

The appeal was allowed, and the conviction quashed.

The Acting Chief Justice: In this case the appellant was charged, under the Act of 1873, with permitting drunkenness on his premises. I think Mr. Innes's contention is a fair one, that these words "permitting drunkenness" imply that there must have been some actual or, at any rate, constructive knowledge It would appear that the man was not served with any drink at the canteen, but that he had obtained liquor before entering the appellant's canteen, and that on entering the place he fell down and lay there, and was soon after taken in charge by the police. In this case there was no evidence and no finding of the Magistrate that the appellant had any direct knowledge, nor under the circumstances can we say that the appellant had constructive knowledge or ought to have been aware before the police acted that the man was drunk. The conviction must be quashed; but I would also point out that I think the Magistrate is right in saying that it is not an excuse for the appellant to say that he was too busy and had no time to observe the drunken man. The Court has less hesitation in quashing the conviction of this case, because it is found that evidence was admitted as to statements made in another case which must have influenced the Magistrate in coming to a decision.

Their lordships concurred.

[Appellant's Attorneys, Fairbridge, Arderne, & Lawton.]

* 9 Juta, 209.

HANEKOM v. HAWORTH. { 1896. Aug. 4th.

Appeal—Cross appeal—Notice—Procedure

This was an appeal from the decision of the Resident Magistrate, Kenhardt, in a case in the Periodical Court in which appellant (defendant in the Court below) was sued by respondent, for the sum of £10 without costs, for damages for the illegal detention of a certain ox. Exception was taken to the summons, that the cause of action was not sufficiently disclosed, also that no special damage was alleged in the summons, and nothing was shown as to how the £10 damage arose. This the Magistrate upheld, ordering costs to abide the final result. Against the order as to costs the present appeal was made.

On the records appeared a note by the Resident Magistrate: "In giving judgment the Court said that the exception was sustained but wrote in error the words 'absolution from the instance.' Immediately after the rising of the Court the mistake as to the words written was discovered and rectified by me.,'

Mr. Graham for appellant.

Mr. Benjamin for the respondent asked to be allowed to move a cross appeal from the bar. Notice had been given to the other side. Owing to the respondent not having access to legal advice on the spot, the first summons had been drawn in a faulty way by the issuer of process. Respondent intended to have a fresh summons drawn, but heard of the present appeal too late for his own appeal to be lodged. No notice of the present appeal was given to respondent.

Mr. Graham objected. The cross appeal should have been set down at least on last provisional day—the time for appeal has elapsed.

Court: The documents and notices are not in proper form.

Mr. Benjamin: We would have noted an appeal in the proper time but did not think it worth while—but it is worth while now that defendant has appealed. We did not know he was going to appeal.

Mr. Graham: The summons was bad, there was no date or place mentioned. The Resident Magistrate was wrong and did not exercise judicial discretion as to costs. The arguments against allowing the cross appeal are the flimsy nature of the grounds of application.

Mr. Justice Solomon: Where an appeal is noted, has any notice to be given to the other side?

Mr. Graham: Section 33, Act 20 of 1856, provides as to appeal. There should be a special motion for cross appeal before appeal. There should be some sufficient ground for the cross appeal. It is no ground that the defendant did not know we were going on.

The Court, by consent, ordered the case to be referred back to the Magistrate to be heard on the merits; the costs of all proceedings in the Court below to be costs in the cause; as to the costs of appeal, both parties having come before the Court in an irregular manner, the Court would make no order.

[Appellant's Attorney, G. M. Walker; Respondent's Attorneys. Messrs. Van Zyl & Buissinné.]

BULPIN V. JACKSON. { 1896. Aug. 4th.

Slander—Defamation—Privilege—*Bona-fide* communication—Proper occasion—Interest—Justification—Reasonable and probable cause.

B. the reporter of a newspaper, S., called upon J., a Government official, at his office, not stating that he was a reporter, but asserting, as it was alleged, that he had come "officially" from the Government to inquire into certain matters connected with J.'s administration.

On the following day a paragraph admittedly incorrect and libellous appeared in S. J., who did not at first know of B.'s connection with S., called at the office of S. to complain about the paragraph and stated that "a drunken and excited person" had called upon him the day before. Afterwards J. wrote to the proprietors of S. calling the visitor in question a "drunken impostor."

Subsequently it was discovered that B. was the reporter complained of, but J., though he wished the proprietors of S. not to deal harshly with B., refused to withdraw the charges of drunkenness and insolence made by him, and B. was therefore discharged from his employment on S.

In an action for libel brought by B. against J., the Magistrate upheld J.'s plea of justification and privilege.

The Court held on appeal as to privilege that *J. was justified in making the communication he did, that the communication was a* bona-fide *one, made on a proper occasion by J., who had an interest, to the proprietors of S., whose interest it was to know the facts.*

This was an appeal instituted from a decision of the Resident Magistrate of Wynberg in an action brought by the plaintiff (Bulpin) against the defendant (Captain Jackson) for £20 damages for defamation of character. There was a claim for a similar amount in reconvention. The Resident Magistrate gave judgment for defendant with costs. Against this decision appeal was now made.

Mr. Schreiner, Q.C., appeared for the appellant; Mr. Molteno for the respondent.

The summons called on Captain Chas. Jackson, manager in charge of the Government Guano Stores at Cape Town, to answer plaintiff, a journalist of Cape Town, employed as a journalist on the staff of the "South African Telegraph" newspaper, in an action for £20 damages for having in the presence of the manager and editor of the "Telegraph" charged the plaintiff with having been drunk at a certain interview when plaintiff called upon defendant (as alleged) in his representative capacity as reporter of the said "South African Telegraph." It was also alleged that defendant addressed a letter to the Editor of the "South African Telegraph" containing these words: "I am determined to find out who is behind the drunken impostor" (meaning plaintiff).

To the summons defendant pleaded: (1) General issue: (2) that the words complained of are not actionable; (3) that whatever words the defendnat spoke or wrote of or concerning the plaintiff were privileged, and were used without malice upon reasonable and probable cause on a privileged occasion where his (the defendant) interests were concerned, he *bona fide* believing them to be true, and in discharge of a duty where his interests were concerned.

Should the foregoing pleas be deemed and held insufficient, but not otherwise, the defendant then pleads: That whatever words were uttered or written by the defendant of or concerning the plaintiff, were true in substance and in fact, and were uttered and written perfectly *bona fide*, without malice, in a matter

where his interests were concerned, and that he (the defendant) was justified in so doing, and that he therefore pleads the truth of the words uttered and written by him, should this Court decide (but not otherwise) that the foregoing pleas 1, 2, and 3 are insufficient.

And for a claim in reconvention the defendant (Jackson) files a counter claim of £20 sterling, as and for damages for libel by reason of the plaintiff the said Bulpin (the defendant now in the claim of reconvention) having at Cape Town, on or about 4th March, 1896, wrote, circulated and caused to be published of and concerning the said Captain Jackson in the "South African Telegraph" newspaper, the following false, malicious defamatory slander:

"South African Telegraph" 4th March, 1895. "Considerable dissatisfactionhas been aroused in official and seafaring circles by the appointment by the Government Guano Company of an uncertificated master to captain the coasting schooner Sea Bird Captain Towns, who has skippered the craft for a long period and holds excellent credentials for navigating skill, has been peremptorily dismissed from the service without the slightest legitimate reason, and a thoroughly incompetent man has been installed in his stead.

"The sole bone of contention arises over some imaginary insubordination, but Captain Jackson, the manager of the company, on being approached wrathfully refused to cast the slightest light upon the subject. The matter is a serious one involving as it does the systematic organisation of the industry, and the Government authorities seem disposed, with the proper working of the contract in view, to demand a rigid investigation of the shady circumstances of the affair."

Thereby meaning and intending to mean that Captain Jackson, actuated by improper motives and in breach of the duty devolving upon him as manager appointed by the Colonial Government to superintend the working of the Government Guano Islands, had wrongfully and unlawfully appointed an uncertificated master to the command of the schooner Sea Bird and had improperly, and being actuated by improper motives, dismissed from the service without lawful cause a man who possessed the requisite qualifications to manage the said schooner and further meaning and intending to mean, convey, and impute that the said Captain Jackson had been guilty of having abused his said position as manager of the working of the Guano Islands; that he (Captain Jackson) had been guilty of dishonourable and improper conduct, and that the Government seemed disposed to investigate the conduct of Captain Jackson and the improper appointment of the master to navigate the schooner Sea Bird by the said Captain Jackson.

With regard to the plea of drunkenness, defendant says:

That plaintiff on or about 3rd March, 1896, entered defendant's office in a state of intoxication and there addressed the defendant.

As to the charge of drunken impos'or, defendant says:

That plaintiff on or about 3rd March, 1896, entered the office of defendant, in an intoxicated state, and in his (defendant's) presence and in the presence and hearing of divers persons, wrongfully and falsely represented himself to be a Government official sent by Sir James Sivewright to the defendant's office to make an official inquiry.

Plaintiff joins issue in pleas 1, 2, and 3.

Plaintiff excepts to the plea of justification upon the grounds, *inter alia*:

(*a*) That being a conditional plea it is not admissible.

(*b*) That it is incumbent upon the defendant in a plea of justification to specifically set forth particulars to be relied upon, wherefore the plaintiff is prejudiced.

With reference to the claim in reconvention defendant in reconvention pleads:

1. The general issue.

2 That what was written and published in the paragraphs referred to was in discharge of a duty as journalist, *bona fide*, and without malice, and in the interests of the public, being a matter in which the public is interested.

3. That the words complained of do not support the innuendo laid in court.

4. That the plaintiff in reconvention by his conduct and actions contributed to the publication.

As to the drunkenness:

That plaintiff on or about 3rd March, 1896, entered defendant's office in a state of intoxication, and there addressed the defendant.

That plaintiff on or about 3rd March, 1896, entered the office of defendant, and in his presence and in the presence, and hearing of divers others, wrongfully and falsely represented himself to be a Government official sent by Sir James Sivewright to the defendant's office to make an official inquiry.

The following were the Magistrate's reasons:

After hearing all the evidence adduced and having referred to the pleas set up by the defendant's agent, it appeared to me that plea 3 was a good and sufficient one, and should be upheld by the Court under all the circumstances of the case,

Addison on the Law of Torts, pages 165 and 166, having been referred to by me, it appeared that the words complained of were under the circumstances of the case privileged communications which the defendant believed to be true, and which were made in a matter in which his interests were concerned, to a person having a corresponding interest or duty.

The defendant's plea 3 was therefore upheld by the Court and judgment given for the defendant with costs.

On the claim in reconvention it appeared to me that the authorship and publication by the plaintiff of the paragraphs complained of as libellous had not been proved to the satisfaction of the Court.

Judgment was therefore given with absolution from the instance.

From the evidence for the plaintiff before the Magistrate it appeared that defendant on the 4th March, 1896, called at the office of the "S.A. Telegraph" and complained of certain paragraphs appearing in that day's issue, saying to the editor that "an excited drunken person" had called at the office of the Government Guano Department the previous day (3rd March) about three p.m., representing himself as commissioned by the Government to make inquiries on the subject matter of the paragraphs. Defendant suggested it was a member of the "Telegraph" staff. The editor on inquiry found that plaintiff had so called at the office; but before he communicated with defendant, the latter wrote to him using the words complained of, "I am determined to find who is behind the drunken impostor"; and asking that these words be used in correcting the paragraphs complained of. Later Captain Jackson called at the "Telegraph" office and reiterated his charge in the editor's private room in the presence of the manager and editor. The editor gave Bulpin a high character for sobriety and steadiness and deposed that at five p.m., on the 3rd March, Bulpin was perfectly sober. Some days later (after Captain Jackson had discovered that plaintiff was a member of the staff and had written the paragraphs complained of) the defendant said he had no wish to injure the plaintiff or have him harshly dealt with, but refused on being pressed to withdraw the charge of drunkenness. The manager thereupon gave plaintiff notice to leave. The Resident Magistrate, Cape Town, and several other witnesses corroborated as to plaintiff's sobriety on the 3rd March, at five p.m.

The plaintiff stated that he called at Captain Jackson's office and saw the clerk first. Plaintiff stated he had come "from the office" (meaning the "South African Telegraph" office). He then saw defendant and referred to the subject matter of the paragraphs: the defendant flew into a great passion. Plaintiff then said: "I have come officially and unless a certain light can be thrown upon the business it is clear the Government and Sir James Sivewright will interfere, Sir James being the Commissioner of Crown Lands and Public Works. . . By officially I meant I came in my official capacity as journalist. . . I thought Captain Jackson knew I was a journalist. . . I won't swear if I had my pipe in my mouth; I had my hat on."

For the defence, Captain Jackson, his clerk (Mr. De Jongh), and a Government messenger (Smith) deposed to plaintiff having come into the office in a rude, insolent manner with his hat on and a pipe in his mouth; that evidently he was not sober, stating that he came "in an official manner from Sir James Sivewright to make inquiries."

Captain Jackson stated that he wrote the letters to the editor before knowing who had written the paragraphs. The latter were admitted by the editor to be libellous, and defendant wrote confidentially to him "because the paper having published the libel it was to their interests as well as mine that the informer should be discovered, as they were the medium." The defendant denied any personal feeling in the matter.

The plaintiff's agent admitted that Sir James Sivewright never sent plaintiff to defendant's office.

It was admitted by plaintiff's witnesses that the paragraphs complained of were "likely to bring a person into contempt if true, and if untrue, to cause him considerable annoyance." Plaintiff however denied that he was the author of the paragraphs in the precise form in which they appeared in the newspaper, though he admitted contributing the general information on which they were based. The original "copy" appeared to have been mislaid in the newspaper office and could not be produced in court.

Mr. Schreiner: It is difficult to see from the records on what grounds Jackson made and persisted in the charge of drunkenness made. The appeal is based fundamentally on the untruth of the defendant's statement. Charges like this must either be true or be believed even if privileged. But was this a privileged occasion as by our law. At the date of making the statements the plaintiff was a reporter of the "South African Telegraph"—but Jackson did not know that. It would be an extraordinary extension of the doctrine of master

and servant. This is not an attempt made by Bulpin's master to obtain the truth as to Bulpin's character. It is Jackson, a third party, who goes to tell Bulpin's employer, though not even a master is bound to follow up and volunteer without inquiry, evidence as to one who was his servant formerly. Jackson stood in not even such a relation as such relation, yet volunteers without inquiry. Now the plea is, it was to the interest of Bulpin's master that he should be told. The Magistrate holds it privileged on the ground that it was to the interest of the proprietors of "South African Telegraph. *Harrison* v. *Bush* (5 Ellis and Blackburn, p. 344) was quoted in *Botha* v. *Brink* (3 Roscoe 35). From that case the doctrine of "interest" was started, and is shown to confine the privilege based on interest to *public* men.

Mr. Justice Solomon: *Harrison* v. *Bush* extended to public men, but numbers of cases have since extended the privilege to cases of private persons—as there is a duty to private *individuals* as well.

Mr. Schreiner: The worst passage against appellant is in *Odgers on Libel* p., 232 (*O'Donoghue* v. *Hussey* there cited). But that passage only seems to show that if Jackson had been attacked by plaintiff he could retort on him—but only so far as regards matters springing out of the attack, and so far as true. As to the duty of the master in giving the character of a past servant, see *Odgers*, pages 212, 213.

Mr. Justice Solomon: Is there not a duty to report to the master his servant's misbehaviour?

Mr. Schreiner: The defendant has not pleaded it was his *duty*—only the *interest* of the paper.

In our law the case most in point is *Diepenaar* v. *Homan* (3 Roscoe, 37), which went far in rejecting doctrine of privilege. In any case, as is shown in all the English cases, the statement even if not true must have been *reasonably* believed to be true. What right had Jackson to persist in it that Bulpin was drunk when it was, at most, discourteous behaviour on the part of plaintiff in coming into his office with hat on head and pipe in mouth. That would be aggravating but would give no right to assume drunkenness. Whatever the Resident Magistrate may have found Jackson had no reasonable ground for belief.

The Court, without hearing Mr. Molteno, dismissed the appeal.

The Acting Chief Justice: It appears that the plaintiff, a person unknown to the defendant, called at his office and had an interview with him. There is a conflict of testimony as to what took place at that interview, which is described by three witnesses on one side and by the plaintiff on the other side. The Magistrate has apparently accepted the statements of the three witnesses for the defence as against the evidence of the plaintiff. After the interview between the plaintiff and the defendant there appeared next morning in the journal with which the plaintiff is connected two paragraphs which it is admitted contained statements which were untrue, and the next day a further paragraph was inserted expressing regret at the insertion of the previous paragraphs. At the interview referred to the defendant did not know the name of the person who had called upon him, but called at the office of the paper inserting the paragraphs (his employers), and described the person who had called on him as appearing to be drunk. It is contended that the defendant was not justified in making this statement. The evidence is very conflicting, but the Magistrate has found that the defendant believed at the time that the charge made was true. The question is, had he reasonable grounds for this? There was Captain Jackson's own statement that the conduct of the plaintiff was such as to lead him to believe that the plaintiff was drunk. There were also the statements of De Jong and Smith, who were both led to the same conclusion. All these witnesses came to the conclusion that there were reasonable grounds to support them in their belief that the plaintiff behaved himself in such a way as to give Captain Jackson the impression that he was not sober on that occasion. It cannot be said therefore that the evidence fails to support the finding of the Magistrate. I will not say from the evidence that the Magistrate might not have been justified in drawing the conclusion that the plaintiff was not drunk; but the evidence is such that three persons reasonably believed that the plaintiff was not in his sober senses. But apart from this, on the question of privilege, the respondent is entitled to succeed. He acted with *bona-fides*, and upon reasonable grounds. He certainly had an interest in making the communication to plaintiff's employer, after the false statements made in the newspaper, and the person to whom the communication was made, as proprietor of the paper containing such mis-statements, had a corresponding interest in receiving the communication. On those grounds I do not think we ought to interfere with the Magistrate's decision.

Their lordships concurred.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

HUGO v. LOTTER. { 1896. Aug. 5th. „ 6th.

Trespass—Diagram—Grant—Water rights—Perennial stream—Riparian owner—Unreasonable use—Irrigation—Diversion.

A grant of land to L. *assigned the boundary of land granted to* H. *as* L.'s *boundary. The end of this boundary was alleged by* H. *to be a beacon marked* C, *but* L. *alleged that this fell within his ground, and that the true beacon was* B., *asserted by* H. *to be inside his boundary.*

In an action for damages for removal of fences and for trespass brought by H,

The Court held *that the defendant's diagrams indicated* C. *as the end beacon, and though it was contended that the defendant's grant overruled the diagram, the Court found that when the land was granted to* L. *by the Government the surveyor took* C. *as the true beacon and that defendant was not entitled to the boundary claimed.*

This was an action brought by Jacobus Johannes Hugo against Matheus Gerhardus Lotter for £130 damages and an interdict.

Mr. McGregor, with whom was Mr. Smuts, for the plaintiff; Mr. Searle, Q.C., with whom was Mr. Maskew, for the defendant.

The plaintiff in his declaration set forth:

1. The plaintiff is a farmer residing at French Hoek, in the district of the Paarl. The defendant is also a farmer, residing at Rust Rivier, in the district of Caledon.

2. The plaintiff is the registered owner of the farm Amandel Rivier, in the district of Caledon. The defendant is the owner of the adjoining farm Amandel Rivierkom, likewise in the district of Caledon.

3. At the time of the grievances hereinafter complained of there was standing on the plaintiff's said farm a wire fence, the plaintiff's property.

4. On or about the 10th day of February, 1896, the defendant by himself and his servants wrongfully and unlawfully, and without the leave and licence of the plaintiff first had and obtained, entered and trespassed upon the plaintiff's said farm and broke and took down the said fence.

5. On or about the 2nd day of March, 1896, the defendant again in manner as in paragraph 4 mentioned, unlawfully and wrongfully and without the leave and licence of the plaintiff first had and obtained, entered and trespassed upon the plaintiff's said farm and still further broke the aforesaid fence and cut the wire and removed the poles further back on the plaintiff's said farm.

6. Subsequently to the breaking down of the aforesaid fence and the wrongful acts hereinbefore set forth, the defendant's sheep and cattle have constantly trespassed on the plaintiff's said farm, and the plaintiff has thereby also suffered loss and damage.

7. By reason of the wrongful acts and trespasses hereinbefore complained of, the plaintiff has suffered loss and damage to the amount of £100, to wit: £75 in respect of the breaking down and destruction of the said fence, and £25 as and for damages in the 6th paragraph mentioned.

And for a further claim the plaintiff says:

8. He craves leave to refer to paragraphs 1 and 2 of the declaration as above set forth, and the allegations therein contained.

9. A certain perennial stream or river known as the Amandel Rivier rises in mountains behind the defendant's farm, and after flowing across the defendant's farm Amandel Rivierkom flows across and over the plaintiff's farm Amandel Rivier.

10. The plaintiff is by law as riparian owner as aforesaid entitled to use and enjoy a reasonable proportion of the water of the said river upon his farm.

11. The defendant disputes and denies the right of the plaintiff to use such proportion of the water of the said river, and has on divers occasions, and more particularly in the month of March, 1895, and February, 1896, obstructed the course of the said river upon his farm and diverted and used more than his reasonable share of the water of the said stream or river to which he is by law entitled as owner of the said farm, and has prevented the owner from having and enjoying the reasonable share of the water of the said stream or river to which he is by law entitled as aforesaid.

12. By reason of the wrongful acts of the defendant in the last paragraph set forth, the plaintiff has been unable to irrigate his arable lands and plantations of trees, and to cultivate his said farm as he would otherwise have done, and was on the last occasion set forth in the

preceding paragraph, to wit, February, 1896, deprived of all the water hereinbefore mentioned, even for domestic purposes, and has suffered injury and loss in respect of such wrongful diversion, to wit, in the sum of £30.

The plaintiff claims:

(*a*) Payment of the sum of £130 as and for damages as aforesaid.

(*b*) An order interdicting the defendant from again trespassing on the plaintiff's farm.

(*c*) An order declaring that the plaintiff is entitled as riparian owner as aforesaid to a reasonable share of the water of the said stream or river, and interdicting the defendant from in any way interfering with such user of the said water by the plaintiff.

(*d*) Alternative relief.

(*e*) Costs of suit.

For a plea to the declaration the defendant said:

1. He admits the allegations on the first two paragraphs.

2. As to the 3rd paragraph he admits that plaintiff erected a certain wire fence in or about 1895, as a boundary fence between plaintiff's and defendant's farms, but he says that the said fence was not erected along the true boundary but was erected upon defendant's property.

3. As to the 4th and 5th paragraphs he admits that he caused the said fence to be removed from his property without the plaintiff's leave, and he says that he was entitled so to do.

Save as above he denies the allegations on the 3rd, 4th and 5th paragraphs.

4. He denies the allegations in the 6th and 7th paragraphs, or that plaintiff has sustained any damage by any acts of his.

Wherefore he prays that the said claims may be dismissed with costs.

And for a plea to the plaintiff's further claim the defendant says:

1. As to the 8th paragraph he craves leave to refer to the 1st. paragraph of the former plea.

2. As to the 9th paragraph he admits that a certain perennial stream known as the Amandel Rivier flows down over his (defendant's) farm and on to the plaintiff's; he says the said steam rises partly on his (defendant's) farm and partly on the adjoining farm Tygerkloof, and he admits the allegations in the 10th paragraph.

3. As to the 11th paragraph he denies that he has ever used more than a reasonable share of the water of the said stream, or diverted more than the said share; he says that in or about 1895, he made a small dam at a point on the said stream upon his own property for the purpose of watering his sheep, and that he led the water of the said stream for a short distance into an old watercourse in which it had formerly run and thence into the present watercourse; he denies that he thereby deprived the plaintiff of any water to which he was entitled. Save as above, he denies all the allegations in the 11th paragraph.

4. As to the 12th paragraph he denies the allegations therein or that plaintiff has sustained any damage by any acts of his with regard to the water of the said stream.

Wherefore he prays that the said claim may be dismissed with cos s.

And for a claim in reconvention the defendant (now plaintiff in reconvention) says:

1. He craves leave to refer to the 1st paragraph of his plea.

2. In or about the years 1894. 1895 and 1896 the plaintiff (now defendant in reconvention) has suffered his sheep and cattle to trespass upon the plaintiff's farm Amandel Rivier Stond, not only upon the portion of ground claimed by him in this action but beyond the boundary so claimed, and the plaintiff in reconvention has thereby suffered damage in the sum of £50.

The plaintiff in reconvention claims:

(*a*) The sum of £50 for damages as aforesaid.

(*b*) Alternative relief.

(*c*) Costs of suit.

The replication of the plaintiff in convention was general.

And for a plea to the claim in reconvention the plaintiff (now defendant in reconvention) said:

1. He denies that he at any time during the years 1894, 1895 and 1896 suffered his sheep and cattle to trespass on the farm Amandel Rivier Kom of the defendant (now plaintiff in reconvention). He admits that his sheep and cattle have grazed upon the portion of his farm extending up to and as far as the fence in the declaration in convention mentioned, but he denies that they grazed beyond the said fence or on the property of the plaintiff in reconvention.

2. He denies that the plaintiff in reconvention has sustained any damage by any acts of his.

Wherefore he prays that the said claim in reconvention may be dismissed with costs.

On these pleadings issue was joined:

For the plaintiff,

Gert Greeff, Government land surveyor, residing at Worcester, sworn, said he had had about twenty years' experience as a surveyor. He had made a survey and plan of the farms of both plaintiff and defendant. The plan produced was correct, and the beacons as set out upon the plan were correct representations of

where they stood upon the land. The point B on the plan represented a long stone planted in the ground with a pole alongside of it. The beacon C was on a flat, grassy hill, the only hill in that neighbourhood This beacon was a whalebone about four feet high, protected by white stones. He had seen the remains of the fence erected by plaintiff. The fence, as compared with the line F to C on the plan, did not run in a direct line; it ran from point F twenty yards inside plaintiff's line about three-quarters of the way up to point C. The plan produced by defendant did not agree with the plan drawn by witness. The letters B and C on defendant's plan corresponded approximately with the plan drawn by witness. There was a slight difference in the two plans. Witness fixed beacon G on the ground, and close to that was a little streamlet. This was marked on the plan of defendant. There were two or three line beacons between A and C, and witness took B to be one of the line beacons.

Cross-examined: He did not know until now that there were ten or twelve beacons along the line F to B. He had seen one pointed out to him by plaintiff, but he had not seen twelve. It was high grass there. He could not dispute evidence that there were twelve. The one he saw was a long stone about eighteen inches above the ground. This was somewhere close to F. He was not previously acquainted with the ground.

By the Court: He did not calculate the area of either the plaintiff's or the defendant's farm.

Jacobus Johannes Hugo, farmer, the plaintiff, residing at French Hoek, owner of the farm Amandeel Rivier, sworn, said he went to the farm in 1882. He planted the wire fence about two years ago last April inside the line F C on the plan, on his own property. Defendant asked what line he meant to enclose, and said, "I have got another line." Ultimately after trying to arrange with defendant, plaintiff planted the fence himself, to which defendant objected, and told him to pull out the poles. Plaintiff refused, and defendant said he would do so. Afterwards plaintiff got a letter of demand from an attorney to pull down the fence. Plaintiff did not do so, and defendant pulled down the fence on 10th February, and removed portions of it on March 5. He saw the defendant take this action. On February 10 he forbade defendant to remove the poles. There was unpleasantness. Along the line the fence took there were small line beacons, the ground having been formerly surveyed and laid out into erven. Plaintiff in putting down the fence went by these beacons. The value of the fence was about £75. Mr. Beyers, who made the survey, was dead. He had the material of the fence, but about thirty poles out of 300 were broken. The poles were worth 2s. a-piece. The greater part of the wire was broken. He used eighteen rolls, which cost about 40s. a roll. It would cost him about £10 to put the fence back again. He put up the fence to prevent the cattle and sheep of defendant from trespassing upon his ground. He helped to put up the beacon C in 1854, when Messrs. Joubert and Marais were the owners of the farm Amandeel Rivier. That was when his father owned an adjoining farm. Defendant had diverted water which plaintiff ought to have had. He had seen water flowing in the old channel when he had none at his house, and the water flowed to defendant' place. In the winter the water flowed naturally in the old channel. He satisfied himself after he found no water at his house that there had been diversion. He said that sods had been taken out and the ordinary channel was dammed up. He noticed this in March. This damming up happened also the year before in the summer. In consequence of this his trees and mealies and potatoes were damaged. He estimated the damage at £30 at a very low estimate.

Cross-examined: A commission of two or three farmers came to settle the dispute, but he knew that the defendant would not agree. The commission agreed that the boundary was along the line of beacons. Defendant might have asked him to see Mr. Joubert on the subject, but plaintiff would not meet him. Mr. Joubert did not tell him when he sold the farm to him that he sold it subject to the boundary being the line of beacons on the north side. He had not spoken to the defendant as to the diversion of water since 1895. Defendant had to use a certain amount of water for the sheep, but they could drink out of the river, although in places the banks were bushy. There were many places twenty yards wide where sheep could drink. He had never heard that defendant had turned the mill stream on for his (plaintiff's) benefit. The mill-stream flowed over the point of the Amandeel Rivier farm, where the water was deep. Plaintiff's sheep never trespassed on Amandeel Rivier Kom. There were strange cattle there, but they did not belong to the plaintiff.

Johannes Stephanus Gunter, farmer, residing in the district, sworn, said he was sixty-three years of age. He knew the farms well, and had known them for over thirty years. He knew the white beacon C in dispute, but had no particular knowledge of it. He only knew that Mr. Beyers, Government surveyor, laid out erven

on what he called the upper line. The beacon C was piled high with stone. It was at the corner of Palmiet Vley, Amandeel Rivier, and Amandeel Rivier Kom. The beacon was there long before Mr. Beyers. Witness first saw it in 1857. He was travelling in that year with a flock of sheep, and slept at the spot one night. There was a muddy vley close by, and the beacon was on a height. There were no other heights near it. Witness helped Mr. Beyers in his survey by chopping bush with an axe, and by placing stones on the lines of surveys. He would not say that the line exactly corresponded with the line of beac n C, but it was not much out. The wire fence exactly followed the line of stones.

Cross-examined: His father looked after the farm Amandeel Rivier at one time. When Mr. Beyers was there witness was asked to come and help him, and he had done so. Witness had left the farm a long time ago. He knew the old line of beacons, and remembered them as long as he had been on the farm.

Johannes Stephanus Gunter, jun., sworn, said he was twenty-four years of age. He knew the two farms. He had taken cattle to graze on defendant's farm. Witness was living at Amandeel Rivier at the time. He had the right to graze cattle there because there were no complaints made. There was an outspan there. He used to graze cattle up to the line of plaintiff's fence. He knew the white stone beacon C. It was on high ground. As to the diversion of water, the water was dammed off by plaintiff last year.

Cro s-examined: He had not seen the millstream turned into Amandeel Rivier in the summer.

Franz Julius, coloured farm-labourer in the employ of plaintiff, sworn, said he knew the farms of the plaintiff and defendant. He knew the white beacon C. Defendant's cattle sometimes crossed on to plaintiff's ground. Three weeks ago they were there, twenty-three head of cattle. He had seen the channel dry on the plaintiff's farm.

Cross-examined: He could not tell the spot where the water was turned off, so he could not say whether there was water up the stream. Even in dry weather the water used to flow in the channel.

Mose Esau, also a coloured labourer, said he had worked for plaintiff. He was on the plaintiff's farm last March. He looked after the water, but he was not satisfied with the flow. It nearly stopped in the ordinary channel, and sometimes there was none at all. He did not know the reason of this. There was no water for five days, and there was not general drought at the time. There had been water just before.

Cross-examined: He was on the farm continuously for four or five days and there was no water to drink. They drank muddy water.

This closed the plaintiff's case.

For the defence.

Renier Johannes Moll, sworn, said he was a Government surveyor and resided at the Paarl. He knew the two farms. He made a survey of the whole of the farm Amandeel Rivier in 1855 for the then owners, Messrs. Marais and Joubert. He found the beacons upon the farm as shown upon the plan produced. He had also carefully surveyed the farm Amandeel Rivier Kom. The plans produced were from actual survey, and the beacons agreed. The distances and the angles were correctly marked. The beacon C would be where the small B was marked. He found the same line of beacons, F B, this year on Amandeel Rivier as was the case in 1855. The line F B agreed in length with the line marked on the diagram. The length of the line F B was 912 roods. The length of the F C was about 902 roods. He had a plan of the whole of the farms in 1855, and by the general contou he could tell that his plan was correct. In 1855 there was nothing in the shape of a beacon at the point C. It was about twenty years after that he saw this beacon as he was going to the Caledon, and he laughed at the idea of a beacon being there. He could not help the Government adopting C as a beacon in 1877, but he thought this was done on erroneous information. In 1855 th re was a dispute between the owners of the two farms, Amandeel Rivier and Amandeel Rivier Kom, and this was why the survey was made. Although he had not recently surveyed the farms, he thought the position of the beacons had been altered since 1855. The line of beacons F B fell on the left of the stream, and he could swear this, notwithstanding the statement of another surveyor that the line fell to the right. The Government ground was used as an outspan. After witness's survey the line F B was accepted by everyone as the boundary of the Amandeel Rivier.

Cross-examined: There was a strip of Government land between the two farms. What was indicated upon the plan was from his previous survey; he knew the ground so well. The line F B was exactly the same line he took in 1855. What Mr. Greeff called C was the whalebone beacon, and witness had made a triangulation here. He had seen beacons on the line F C, but some of them seemed a little out. In 1877 the Government apparently took up C as the boundary. Witness did not survey Amandeel Rivier recently, but put down

the lines from observations he had made in 1855. The majority of people agreed that his lines were the old lines of outspanning.

Marthinus Gerhardus Lotter, the defendant, sworn, said he was a farmer and lived at Rusfontein, near Amandeel Rivier. He was sixty-six years of age. When he first knew the line of beacons they were as represented on the plan. He had never known any alteration. He had never seen a whalebone at the beacon C, but just loose stones There was some talk between himself and plaintiff as to a fence, and plaintiff asked witness to fence the line in. Witness was willing to join and give the poles; plaintiff finding the wire. This was in 1894. Then came the dispute as to the boundary, and plaintiff put up the fence himself. Plaintiff would not agree to the decision of the commission of farmers. He took his boundary from the line of stones. Witness's cattle had trespassed on plaintiff's ground but the sheep had not. This was both before and after the fence was put up. His cattle had done no damage to plaintiff's veld. Plaintiff hired his veld to other people. As to the water witness had taken out some water from the river to water his sheep because the animals could not drink, the channel being deep. He diverted the water into a small channel, and the surplus flowed back again into the main channel. He did not take more than a reasonable share, not more than one-sixth. The first he had heard as to diversion of water was when he got the summons.

Cross-examined: The stones he had spoken of were not in the line of beacon C at all. There were no beacons between Palmiet Vlei and Amandeel Rivier except the one heap of stones at C. He had only seen the beacon C the last fifteen years, but he could not say how long it had been there. He bought his farm by public auction according to the conditions of sale. He had given orders that his cattle were not to be allowed to trespass. In March there was no water in the old channel.

Daniel Johannes Joubert, farmer, Drakenstein, sworn, said the farm Amandeel Rivier formerly belonged to his father and Mr. Marais: afterwards witness and his brother and W. Marais bought the farm. These three sold the farm to plaintiff. He was frequently upon the farm in his father's time. He had seen the whalebone beacon. When his father was owner of the farm there was no beacon there. They had always kept the same line of boundary in his father's time and in his own time. Witness sold the farm sixteen or seventeen years ago, and had the farm six or seven years before. Witness never gave anyone authority to fix the beacon C where the whalebone is now. He knew of no boundary other than the line of stones.

Cross-examined: Witness's father died after witness bought the farm: about twelve years afterwards. When he said the beacon was not there in his father's time, he meant during the time his father was owner. The beacon C must have been put up after witness sold the farm. Witness had only been upon the farm once from the time he sold the farm until last year, when he saw the beacon. It could be seen from the road.

Jacobus Daniel Gunter, farmer, sworn, said he was born at Amandeel Rivier, and had lived there about forty-four years. He had charge of the farm when Mr. Joubert was not there. The boundary of a farm was marked by a line of stones. He helped Mr. Moll in his survey in 1855. The stream lay on the right-hand side going up to the beacon.

Cross-examined: He thought Mr. Moll made the last survey, and that Mr. Aling's survey was made before. He did not know whether Mr. Aling had surveyed the ground since or not. The beacons now were the same as they were in 1855, and he had visited every beacon on the lines. He did not go all round the farm.

Stephanus Johannes Gunter, brother of the last witness, and a brother of the witness who gave evidence for the plaintiff, said he was seventy-eight years of age. He knew the farm Amandeel Rivier, and he came to it with his father when he (witness) was eleven years of age. This was before the time of Mr. Joubert. Witness left the farm when he was thirty-eight years of age—forty years ago. After this he often went to see his brother, and knew the farm well. He knew the beacon C claimed by the plaintiff. A heap of stones lay there formerly. In witness's time that was never regarded as a boundary for Amandeel Rivier. The stones were put there after Mr. Aling's survey.

William T. P. Hutchinson, sworn, said he was a member of the Divisional Council of the Caledon district. He had lived at De Villiersdorp close on forty years. He knew the farm Amandeel Rivier very well, and had used the farm for hunting and also the outspan. So far as he knew the boundary on the outspan side was a line of stones, with which he was well acquainted. At defendant's request he visited the place with others in April, 1895. They tried to settle the dispute, but plaintiff said he would have nothing to do with it.

Andries Willemse, coloured labourer, sworn, said he had worked for defendant, He was

working for defendant last February. He knew the stream running down to the farm Amandeel Rivier. He remembered turning out water upon defendant's farm to water his sheep. He did not know how many days the water ran after it was turned out. More water went down the stream than was turned out. The sheep could not get to the water.

Cross-examined: Witness was also on the farm in March. He did not remember that all the water was turned off in March, and was not present at any diversion of the water.

Pieter Stephanus Marais, sworn, stated that he was Field-cornet, and lived at De Villiersdorp. He was seventy years of age. He knew the farm Amandeel Rivier, and also the outspan placed. He had often used the outspan. He knew the line of old stones claimed by the defendant as the boundary. As long as he had known the farm that line of stones had been the boundary. He had never seen the beacon C, and had never known it as a beacon.

David Jacobs, coloured labourer, in the service of defendant, sworn, said he remembered water being taken out last year for defendant's sheep. There was plenty of water left to flow down to the farm Amandeel Rivier.

This close the case for the defendant.

Mr. McGregor, for the plaintiff, argued: The main question is that of the fence and boundary. The defendant clearly on his own diagram is not entitled to the land claimed. The Government recognised the beacon we claim by making their grants consistent with it, and they are estopped from denying it. *Mouton* v. *Van der Merwe* (Buch., 1876, p. 21). The upper proprietor can only irrigate after leaving enough for domestic use of the lower proprietor (*Hough* v. *Van der Merwe* (Buch., 74 p. 148).

Mr. Searle: It lies on the owner if he wishes to assert title to prove it—and this he can do only in one of two ways, by proof of grant or prescription. The original boundary of the farm was clearly defined by a line of stones. The grant is not very old (1832) and surveys and diagrams in those days were accurately made. If plaintiff wishes to establish his right to a further part he must prove acquisition by grant or prescription. He sets up no case of prescription, though indeed plaintiff, since he has been there, *has* claimed the extra bit—but that is only fourteen years. As to title by grant it is admitted by plaintiff's surveyor that the beacon now claimed by plaintiff cannot be held to be the one on the diagram. *Mouton* v. *Van der Merwe* (Buch., 76, p. 18) shows that in regard to diagrams differing from the grant the Court will take the evidence and will establish the beacons.

Mr Justice Solomon: The Government, your predecessors in title always acknowledged plaintiff's title. Are not you bound by that? Does not Mouton's case refer to where both sides dispute the boundary line?

Mr. Searle: But the evidence is not clear on the point.

Mr. Justice Solomon: But didn't the Government give *you* your own grant up to line F C, describing that as plaintiff's line?

Mr. Searle: No. The case of *Stadler* v. *Hugo* (Buch., 1876, p. 7), is strongly in our favour. The plaintiff has not established title by grant or prescription, and the mere negative fact of Government not granting to defendant up to plaintiff's original boundary cannot allow plaintiff to claim up to defendant's diagram boundary. So far as concerns title plaintiff has only been in occupation—can he claim for the trespass. Unless plaintiff shews that he is entitled beyond the line of beacons he is not entitled to damages for trespass.

Acting Chief Justice: The plaintiff in this case is the owner of the farm Amandeel Rivier, and the defendant is the owner of the adjoining farm, Amandeel Rivier Kom. The plaintiff complains that he having erected a fence on the boundary between these two farms, the defendant in February and March last trespassed upon his ground and unlawfully removed the fence, for which he claims damages. The defendant pleads that the fence was not erected along the true boundary, but on his (defendant's) property. I think the defendant has utterly failed in proving that the true boundary is the boundary claimed by him. To prevent confusion, I take the plan prepared by Mr. Greeff. On the boundary line there shown there is at one corner a beacon marked F. The position of that beacon is common cause, and admitted between the two parties. The plaintiff, however, contends that the other end of the line is the beacon C, whilst the defendant says it is the point marked B; but I find on looking at the defendant's grant, which was made in 1894, whereas the plaintiff's grant was made in 1832, that the beacon C and not B is the one indicated by the diagram attached to his title. Mr. Moll, an experienced old surveyor called for the defendant, stated that there was no doubt in his mind that the surveyor took the beacon C now in existence as the beacon, and laid out the farm on the lines now claimed by the plaintiff. Mr.

Moll, however, said he might not be mathematically correct, but was within four roods. Giving the defendant the line C F, the defendant has the whole of the property granted to him by his diagram. In deciding on disputed boundary lines the Court has frequently adopted the rules laid down in section 47 of the Land Beacons Act of 1865 as instructions to commissions of inquiry in disputes as to beacons. In this case when the land was granted to the defendant, the beacons were pointed out. The evidence on this part of the case is not very direct, but the impression on my mind is that the beacon pointed out was the beacon C. The diagram also shows that this is the beacon, but the defendant contends that the diagram is overruled by the grant, which says that the boundary on the south side of his land shall be the plaintiff's land. By plaintiff's grant of 1832 I find that a position much more in accordance with C than B is indicated. When the Government first proposed to dispose of their land, from the diagrams it is clear that as far back as 1877 the surveyors took the beacon C as the corner beacon. It is proved that this beacon, was built many years ago, and evidently it was accepted by the Government as the corner beacon of these farms. Afterwards in 1894, when the Government granted to the defendant his farm, they adopted and accepted this beacon as the boundary of these two farms. The remarks of the Chief Justice in the case *Mouton* v. *Van der Merwe* (Buchanan, 1876, page 21), are directly in point in this case. Under these circumstances I think it is clear that we cannot go back from the line the Government adopted when they made the survey of the farm and granted it to the defendant, and there is no equity or justice upon which the defendant can shift his line further back. The plaintiff has therefore succeeded as far as his claim to the boundary is concerned. There is no prayer for a declaration of rights, the prayer is for damages—but I think we ought to indicate that we give damages because we find the line F C the true line. According to that finding the plaintiff was justified in erecting his fence, and the defendant had no right to remove it. The plaintiff says it would cost him £10 to again erect the fence, and the defendant trespassed upon his land in removing the fence. Therefore I think that judgment for the plaintiff for £15 damages and costs would cover the justice of this case. As for the claim for diversion of water, it is admitted on both sides that there is a perennial stream running through both properties. The allegation is that there has been undue diversion, but this is denied by the defendant. It is evident this, however, has not been made a point in the case, and there was no dispute as to the water until the declaration was filed. It has not been proved that there was any undue diversion of the water. Though the defendant has failed on this claim I think we should give absolution from the instance on this count as a judgment for the defendant might be taken to imply that the plaintiff has no right whatever to the water. Judgment will therefore be for the plaintiff on the first count of his declaration, with £15 damages and costs; on the second count, absolution from the instance, and I think the plaintiff ought to pay the witnesses's expenses necessitated on the second count.

Their lordships concurred.

[Plaintiff's Attorney, P. de Villiers: Defendant's Attorney, V. A. van der Byl.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

RUTHERFOORD V. LE GRANGE AND ANOTHER. 1896. Aug. 6th.

Mr. Tredgold applied for provisional sentence on a joint promissory note for £95, with 10 per cent. interest from the due date.

Granted.

REHABILITATIONS.

Re JOHANNES MARTHINUS SMALBERGER.

On the application of Mr. Molteno, Johannes Marthinus Smalberger was rehabilitated.

Re JOHANN S LINDE BEYERS.

On the application of Mr. Maskew, Johannes Linde Beyers was rehabilitated.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE EDWARD H. TAYLOR.

Mr. Searle, Q.C., applied for authority to the executrix testamentary to raise a sum of money

on mortgage of certain land at Wynberg, the property of the said estate, for the purpose of effecting certain necessary repairs to the buildings thereon.

The application was ordered to stand over for further information.

IN THE MATTER OF THE MINOR CHARLES P. TIRAN.

Mr. Tredgold applied for the appointment of some suitable person to represent the said minor in the execution of certain articles of clerkship with the attorney, Christian M. Lind, and for authority to pay the costs of this application and of the articles out of funds accruing to the minor out of his parents' estate.

The Court referred the matter to the Master for report.

IN THE MATTER OF THE MINORS BOTHA.

Mr. Tredgold applied for the appointment of a curator to represent the said minors in regard to the subdivision of certain landed properties situate in the division of Oudtshoorn, and owned by them in co-partnership with others, and for leave to mortgage the minors' shares for the purpose of providing funds to meet the costs of the subdivisional transfers.

The Court granted an order in terms of the Master's report.

IN THE ESTATE OF THE LATE ROBERT NEWCOMBE, SEN.

Mr. Molteno applied for authority to the executors to sell by public auction or private treaty, as may be most beneficial, certain piece of land with the buildings thereon, situate on the Hill at Port Elizabeth, the property of the estate, for the purpose of satisfying certain mortgage debts and paying legacies becoming due.

The Court granted an order for leave to mortgage in terms of the Master's report.

THE PETITION OF MOSES FAKTOR.

Mr. Molteno applied for a rule *nisi* requiring one Piet de Wet to show cause why applicant shall not be admitted to sue him *in forma pauperis* in an action for recovery of an amount due for services rendered and for materials supplied.

The Court granted a rule *nisi*, the order to be returnable on 20th inst.

KAFFRARIAN STEAM MILLING CO. } 1896.
V. REGISTRAR OF DEEDS. } Aug. 6th.

Registration — Company — Supplementary Deed of Settlement—Act 23 of 1861, section 7.

The K. Co., *by virtue of a clause in the original deed of settlement, agreed on the 11th March, 1896, to continue to carry on business for a further period of 10 years.*

On the 23rd June, 1896, a supplementary deed of settlement embodying the resolution was on or before the 30th June, tendered for registration under Act 23 of 1861. The Registrar declined to accept it, holding that section 7 of Act 23 of 1861, in requiring such deeds to be tendered for registration within one month, had not been complied with and that the registration should have been effected within a month from the date of the resolution.

The Court *ordered the Registrar too accept and register the deed.*

This was an application upon notice to the Registrar of Deeds to show cause why he should not be ordered to register the supplementary deed of settlement executed by the applicant company on the 23rd day of June, 1896.

Mr. Searle, Q.C., moved.

Mr. John James Whitaker, of King William's Town, managing director of the Kaffrarian Steam Mill Company (Limited) made affidavit:

1. That deponent is the managing director of the Kaffrarian Steam Mill Company (Limited), carrying on business in King William's Town and Molteno.

2. That the said company was constituted on the 1st day of July, 1886, to continue for and during a period of ten years until the 30th day of June, 1896, and was duly registered in the Deeds Office of this colony as a Limited Liability Company under the provisions of Act No. 23 of 1861.

3. That at a general meeting of the company held at the office of the said company in King William's Town on the 11th day of March, 1896, in terms of section 64 of the original deed of settlement of the said company as amended by section 5 of the supplementary deed of settlement dated the 16th day of April, 1889, it was resolved to continue the said company for a further period of ten years, reckoned from the 1st day of July, 1896, the resolution being as follows:

"That in terms of section 64 of the original deed of agreement this company be continued for a further period of ten years reckoned from the 1st day of July, 1896."

4. That in order to register the continuance of the said company a supplementary deed of settlement was drawn up on the 23rd day of June, 1896, embodying the said resolution, and was duly lodged with the Registrar of Deeds for registration under Act No. 23 of 1861, who on the 3 th day of June, 1896, returned the said deed to Messrs. Fairbridge, Arderne & Lawton, with the following memorandum endorsed thereon "not entitled to registration." "Should have been lodged on or before the 11th April, 1896, *vide* section 7, Act 23 of 1861."

The Registrar of Deeds made the following report:

1. Section 7 of Act 23 of 1861 enacts, *inter alia*, that within one month after the date of any new or supplementary deed of any company registered under the Act, there shall be transmitted to the Registrar of Deeds a true copy of such deed, attested as such true copy.

2. The supplementary deed in respect of which this application is made was agreed to on the 11th March, 1896, a copy thereof having been attested for the purposes of registration on 23rd June, 1896, and tendered to me on the 30th June, 1896, nearly four months after the date upon which the amendments were passed.

3. I considered therefore, that I had no alternative but to reject the deed.

4. If the contention of the applicants to correct, registration might be postponed for an indefinite period.

5. A similar application was, I may add, made by the South African Milling Company on 5th December, 1893, the Registrar having refused to accept a new deed on the grounds that it was tendered after the lapse of one month after date (see *Sheil*, 6 Vol., III, p. 45).)

The Acting Chief Justice: The application will be granted; subject to such rights as the Government may be advised they have.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

MARTIN V. PURCHASE. { 1896. Aug. 7th.

This was an appeal from the judgment of the Resident Magistrate, Cape Town.

Mr. Graham appeared for the appellant.

Mr. Molteno for the respondent.

This appeal was from the granting by the Magistrate of judgment for a claim for £1 19s. 7d., interest on a promissory note for £198 for seventy-three days at 5 per cent. where the promissory note *ex facie* was not in plaintiff's name.

After hearing Mr. Graham only,

The Acting Chief Justice said: The contract is certainly an extraordinary one, but the evidence is all on one side, and is uncontradicted by the defendant, who was called as a witness and gave evidence on other parts of the case which are not appealed upon. Mr. Bultitude, an outsider, said that he held the bill as bailee for the plaintiff, and that there was an arrangement as to interest. Purchase wanted 6 per cent., and Martin was willing to give 5 per cent. Bultitude advised Purchase to accept 5 per cent., and that figure was agreed to. That was not contradicted. When Martin was prepared to pay the bill he came to Bultitude, who asked him, "What about the interest?" Martin said he had got Purchase to forego the interest, but Purchase denied having done so. The Magistrate's decision must be upheld, and the appeal dismissed with costs.

RANDALL V. GRAHAM'S TOWN MUNICIPALITY.

This was an appeal from the decision of the Resident Magistrate of Graham's Town given on April 23 last.

Mr. Innes, Q.C., for the appellant.

Mr. Searle, Q.C., for the respondents.

The appellant is a Town Councillor, and was sued by the Town Council for £3, due as water rate on a piece of land and a building. He had admitted £2, and contended that the £6, which was the rate for 1894-5-6, being levied on movable property, could not be recovered. The judgment of the Magistrate was against the appellant.

Without calling on Mr. Searle the appeal was dismissed.

The Acting Chief Justice said: The question is a very narrow one—whether the building on

the property in question comes within the 9th section of the Graham's Town Municipal Act No. 12 of 1878, which authorised the Council to levy a water rate thereon. The question has been discussed in a previous case, between the same parties and it is very difficult to distinguish between the previous case and the present. The evidence is practically the same, and even technically there is very little difference. In the other case it was distinctly decided that the building was a building contemplated by the Act, and water rate could be levied thereon. It would now require something very much stronger than what has been brought in this case to induce this Court to change its previous decision. In my opinion the building must be treated as a substantial erection in respect to which water rate is payable. It appears from the evidence that owners previous to the present appellant have paid water rate. As regards the street the evidence is clear that there was a street used by the public for the last forty years, and the street has divided the two properties of the appellant. On all the grounds the Magistrate's decision is quite correct, and the appeal must be dismissed with costs.

MICHAELSON V. MULLER.

This was an appeal from the decision of the Resident Magistrate of Uniondale in respect to allowing an exception on a summons in the case between the parties.

Mr. Graham appeared for the appellant.

The Acting Chief Justice said the Magistrate was evidently in the wrong, and the appeal must be allowed with costs and the case referred for trial on the merits.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

REGINA V. LOUW AND OTHERS. } 1896. Aug. 10th.

Mr. Sheil applied for change of venue of the trial of certain cases to the Circuit Court, Uitenhage.

Applications granted, saving all just exceptions.

VOS V. DE GREEF.

This was an appeal from the decision of the Resident Magistrate of Malmesbury.

Mr. Graham appeared for the appellant.

The Acting Chief Justice said: The plaintiff sued the defendant for the return of an anker or the value—which appears to be 10s. In July, 1895, the father of the plaintiff lent an anker to Peter de Greef. This anker was apparently a new one, because De Greef was asked to put a V upon it to identify it, so that it should not be lost. Plaintiff afterwards borrowed an anker from Peter de Greef, and was given the one borrowed from old Mr. Vos. Twelve months afterwards, young Vos claimed an anker from the defendant, and said it was marked "M.V." Old Vos had in the meantime surrendered his estate, and was owing money to the defendant at the time. The Magistrate thought that Vos wanted to get out of his obligation to Greef, and judged that, from the manner in which the witnesses gave evidence, he must believe the defendant's story in preference to plaintiff's. Mr. Graham has eloquently argued his case, but the Magistrate has seen the witnesses and decided to believe those for the defendant, and we cannot reverse his judgment. It was purely a question of credibility, and the appeal will therefore be dismissed.

Ex parte BEDDY. } 1896. Aug. 10th. „ 11th.

Extradition—Bigamy—Act 22 of 1882—Committal—Evidence—Procedure.

B., *a medical practitioner carrying on business in the Free State, received a citation to answer an action for divorce instituted against him in England.*

While at Cape Town on his way, as alleged, to England he was arrested at the request of the Free State authorities and proceedings were taken for extradition on a charge of bigamy, he having been married in the Free State subsequent to the date of the marriage which was alleged in the English proceedings to have taken place, but which was denied by B. *to have ever taken place.*

The Resident Magistrate not being satisfied with the evidence before him did not commit the prisoner, but remanded him three times to enable further evidence to be obtained. On application by B. *for discharge from custody,* The Court *ordered the release, the Crown*

offering no objection and the Free State authorities not being prepared with further evidence in the matter.

This was an application by Dr. Thomas Alfred Beddy, of Jagersfontein, Free State, for his release from his arrest at Cape Town under the Extradition Act on the charge of bigamy.

Mr. Innes, Q.C., for the applicant.

Mr. Sheil, Assistant Law Adviser, appeared for the Crown, and offered no objection to the application.

The affidavits showed that a certain Theresa Maria Beddy, of London, charged the applicant with having married her in London and then having married a lady in the Free State.

The applicant's petition set forth:

1. That your petitioner is a British subject, and has for some time past been practising as a doctor of medicine in the Free State.

2. That towards the end of the month of July your petitioner was served with a citation issued out of the Divorce Division of the High Court of Justice in London at the suit of a person alleging herself to have been lawfully married to him in December, 1894, and claiming a divorce by reason of your petitioner having married at Jagersfontein recently.

3. That your petitioner denies the alleged marriage in London, and amongst others showed the citation to Mr. Justice Hertzog, a brother of his wife, in Johannesburg, and upon the advice of that gentleman he left the Free State with the intention of proceeding to London to defend the action instituted against him.

4. That on the 27th day of July, at Cape Town, your petitioner was arrested by a detective upon a warrant issued under the Extradition Act, and brought before the Resident Magistrate the next day upon a charge of bigamy.

5. That having been remanded until the 4th August, and then again until the 7th August in order to enable the papers to arrive from the Free State, your petitioner is, he maintains, now illegally detained in custody.

6. That your petitioner annexes hereunto copies of the proceedings before the Resident Magistrate's Court, which he is advised are not in conformity with the requirements of the Extradition Act 22 of 1882, for the consideration of this Honourable Court.

Wherefore your petitioner prays that your lordships may, after consideration of the allegations preferred against him, order his discharge or grant such other relief as may seem to your lordships meet.

Mr. Innes: The documents are admissible, but they contain no evidence against accused. They are sufficient to justify arrest, but not a removal or committal. The Resident Magistrate is only justified in remanding if there is reasonable ground for presuming evidence will be forthcoming. It is difficult to see what further evidence can be forthcoming from the Free State. The fact of the Law Department raising no objection to this motion shows that they expect no further evidence. The Act says the Resident Magistrate must give his reasons for the order. He does not—we can only assume that it is what the Crown assigns: viz., to obtain further evidence from the Free State, the ground on which Inspector Clark applied for the remand.

Mr. Sheil: There is nothing to show whether there are or are not witnesses in the Free State who were also present at the marriage in England. We wired to Free State but received no reply. We can express no opinion as to probability of further evidence. Notice has been issued under section 7, Act 14 of 1893.

[The case was allowed to stand over for the production of a copy of the warrant, and to see whether further evidence was likely to be forthcoming.]

Postea (August 11).

Mr. Sheil read a telegram received from the Free State authorities, in answer to a wire asking whether further evidence was likely to be forthcoming and what the nature of it would be, to the following effect: "We have no evidence of first marriage beyond what has been sent. As it will take months to get it from England, we will not ask for Beddy's further detention."

The Acting Chief Justice gave judgment as follows: That the proceedings in this case were properly instituted in this colony under the Extradition Act, and that the crime alleged, namely, bigamy, is an extraditable offence, is not disputed. After applicant's arrest he was properly taken before the Magistrate of Cape Town. The 7th section of the Extradition Act, No. 22, 1882, required the Magistrate to deal with the case in the same manner, as near as may be as if the prisoner were brought before him charged with an indictable offence committed within the Colony. Acting under this section, the Magistrate commenced an inquiry equivalent to the preparatory examination directed to be held by Ordinance No. 40. A copy of the deposition taken in the Free State, which is made admissible in evidence by the 12th section of Extradition Act, was produced before the Magistrate, but the statements contained in this deposition were not such as to satisfy the Magistrate as to the conclusion to be arrived at on the case. The 36th section

Ordinance 40 enacts that "where sufficient grounds do not appear for at once committing for trial or for discharging the accused, and there shall appear to the Magistrate probability that further evidence may be produced, the Magistrate may grant a warrant for committing him for further examination." The Magistrate accordingly remanded the applicant from July 20 to August 4. On that date no evidence was produced, but another remand was granted until August 7. On the accused being then brought up the Inspector of Police applied for yet another remand for a week in order to receive further evidence from the Free State. This applicant objected to, and claimed his discharge on the grounds that there was insufficient evidence to warrant a committal, and that it was impossible for the Free State authorities to produce evidence on oath of the alleged prior marriage upon which the charge of bigamy was based. The Magistrate, however, again remanded the accused for further examination until August 14. Now if the petitioner had been committed by the Magistrate this Court would now have been in a position to look at the evidence, and decide whether or not the committal had been a proper one. But as there had not yet been a committal, ought this Court to interfere at this stage? I think it ought not to do so if there is a reasonable probability that further evidence will be produced. Is there any such probability? The applicant denies on oath that there was any previous marriage, and asserts that no evidence can be forthcoming to prove it. There is no answering affidavit, and the Crown is not now prepared to allege that any such evidence is likely to be forthcoming, although the Free State authorities have been duly advised of the difficulty. Under these circumstances any further remand would be useless, and the accused is entitled to have the examination closed. The usual procedure would be to send the matter back to the Magistrate for this purpose, and for the Magistrate then either to commit the accused or discharge him. But as it is admitted by the prosecution that there is no evidence upon which the Magistrate can exercise his discretion, and as the Crown has no objection to the Court at once disposing of the case, and as the Free State authoritories by telegram put in this morning do not wish for the applicant's further detention, it is unnecessary to remit the case. The application will, therefore, be now granted, and the discharge of the accused ordered as prayed.

[Applicant's Attorneys, Messrs. Van Zyl, Buissinné & Leonard.]

SUPERME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

*MACFARLANE V. BRUNETTE. 1896. Aug. 11th. „ 12th.

Insolvency—Purchase of shop goods by insolvent — Liability of insolvent to action—Permission to trade - Ordinance 6 of 1843, section 71.

B.'s *estate was sequestrated in 1885. Meetings were called, but no creditors attended and no trustee was elected.* B. *thereafter bought shop goods, but in an action excepted that he was insolvent and the Resident Magistrate upheld the exception.*

On appeal,

The Court held *that the Resident Magistrate had wrongly upheld the exception, and that* B. *was liable to be sued.*

This was an appeal from the decision of the Resident Magistrate of Knysna.

Mr. McGregor appeared for the appellant.

The appellant was the plaintiff in the Court below, and he sued the defendant for goods sold and delivered. Defendant raised an exception that he was an insolvent. His estate was sequestrated in 1886; two meetings of creditors had been called, but no creditors had attended and no trustee had been elected.

Mr. McGregor: The insolvent could acquire whatever property section 49, Ordinance 6 of 1843, allows, there being in this case no confirmation of account as no trustee was elected, no creditors turning up at the meetings. Now section 49 allows insolvent to acquire "hire wages, &c, obtained by himself and family." *Hall's Trustee* v. *Hall* (6 J., 190); *Stewart* v *Barling* (7 J., 1). The Ordinance gives respondent a right to sue for such or with such money as is acquired by personal labour, &c.

Mr. Justice Solomon: Yes, but yours is the converse case—can he be sued?

Mr. Macgregor: The insolvent cannot raise that objection now—we are entitled to our judgment, the only question is what we can attach. The trustee could raise the defence, not the insolvent, who has got his *quid pro quo*. Section 124 of the Ordinance dealing with civil

* See *Warner's Assignees* v. *Warner's Trustee* (Jute)

imprisonment applies only after distribution of estate. The judgment might be barren—but we are entitled to claim it as in *C.G.H. Bank v. Melle* (3 Sheil. 299).

Mr. Justice Solomon: My difficulty is that the 71st section of the Insolvent Ordinance makes any dealing by the insolvent, without the consent (in writing) of the trustee, whether for himself or others, an act of culpable insolvency. Doesn't that prohibit any dealings?

Cur. ad. vult.

Postea (August 12.)

The appeal was allowed with costs.

The Acting Chief Justice: In this case the defendant sued the plaintiff in the Magistrate's Court at Knysna for the balance of a shop account for goods sold and delivered. The defendant excepted or it would be more correct to say pleaded that the plaintiff was not entitled to sue him because he was an insolvent. The evidence showed that in the year 1895 defendant's estate was sequestrated and that two meetings of creditors were called, at which no creditors were present. The Magistrate held that this insolvency was a bar to the action, and sustained the plea and dismissed the case. In our opinion the Magistrate erred in this respect. The account sued upon was a debt incurred after the insolvency, and consequently the plaintiff was not a creditor under the insolvency; nor could he prove under such insolvency. No doubt any person dealing with an insolvent, in whose estate no account has been filed, deals with him at his own risk, but it is no answer to an action for the defendant to say, I am insolvent and you cannot sue him. Under the 49th section of the Insolvent Ordinance, an insolvent, even though the account has not been filed, can acquire property through money earned by his personal labour, &c., and it may be that if he enters into contracts with other persons, that property may be executable. Under the circumstances the defendant cannot therefore set up any rights that the trustee in his estate might have as a bar to the proceedings brought against him. In two previous cases the Court has distinctly decided that under these circumstances the defendant can be sued. Therefore, according to previous decisions, and according to our reading of the present Ordinance, we think the Magistrate ought to have overruled the exception; whether it is any use the plaintiff suing the defendant is quite another matter. The defendant cannot take out execution against any assets which may vest in the trustee of the insolvent. The question arose whether section 71 does not bar an insolvent from buying and selling goods. But the Court is of opinion that the intention of that section is to prevent the insolvent entering into trade without permission of his trustee, but that it does not apply to a case where the insolvent buys necessaries for his own use. The Magistrate's decision will be reversed, and the case will be remitted to the Magistrate to be tried on the merits. The appeal will be allowed, with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

MICHAELIS v. PRETORIUS. { 1896. Aug 12th.

Appeal—Attachment to found jurisdicti n—Rule *nisi*—Interlocutory order - Interdict—Insolvency—Act committed outside Colony—Peregrinus - Residence in Colony - Immovables in Colony - Ordinance 6 of 1843, section 4.

M., *a foreigner domiciled in the Orange Free State, applied to the High Court of Griqualand West for an order for attachment of a certain farm in the Colony to found jurisdiction in proceedings for the sequestration of the estate of* P., *who was also domiciled in the Orange Free State.*

The claim against P. *arose on a contract made and to be performed in the Orange Free State.*

The High Court refused to grant the provisional order of sequestration but issued a rule nisi *(to operate as an interim interdict in restraint of alienation of the farm) "pending further proceedings for the recovery of the debt alleged to be due . . . or for the sequestration of the respondent's estate or otherwise."*

G. *had (prior to the rule being granted) bought the farm from* P. *though he had not received transfer. It was alleged that the*

farm was sold at a sum considerably under its value, but it was on affidavit that P. had been sued by other creditors in the Colony.

Under all the circumstances the High Court discharged the rule on the return day.

On appeal, *the Court held that there being no appeal in case of an application for attachment, and it not being proved that there had been any act of insolvency committed in the Colony, the appeal must be dismissed.*

This was an appeal from the decision of the High Court, Griqualand West.

In the proceedings before the High Court the petition of Emil Michaelis (the present appellant) was as follows:

1. Your petitioner is a general dealer, carrying on business and resident at Jacobsdal, in the Orange Free State.

2. The said Hendrik Christian Pretorius (hereinafter sometimes called "the debtor") is a farmer, also resident at the same place.

3. The debtor is indebted to your petitioner on a promissory note and an open account for the value of goods sold and delivered by your petitioner to him in the sum of £200 (two hundred), or thereabouts, for which your petitioner holds no security. The said promissory note is overdue and unpaid, and your petitioner is about to take immediate proceedings in the Courts of the Orange Free State for the recovery of the sums due thereon, and, if not paid, will petition forthwith for the compulsory sequestration of the debtor's estate in that State.

The debtor is also similarly indebted to one Edward Eager Hurly, lately a storekeeper at Jacobsdal, but presently resident at Kaal Vallie, Ventersburg-road, in the said State, in the sum of upwards of £180 (one hundred and eighty), for which the said Hurly has no security, and for which he is about to sue, and, if need be, also petition for the compulsory sequestration of the debtor's estate in the Orange Free State. The duly authorised representative and agent of the said Edward Eager Hurly has informed me to the above effect, and that he has no power-of-attorney sufficient to authorise him in joining in this petition (but only authorising him to act in the Courts of the Orange Free State), but that he entirely approves of the course now bein taken by your petitioner in presenting this petition.

Your petitioner is aware that the debtor has other creditors besides those above mentioned.

4. The debtor has not, to the knowledge, information, and belief of your petitioner, any assets other than the farm known as Goede Hoop H., No. 110, situate in the division of Herbert, within the jurisdiction of this Honourable Court, and certain town property at Jacobsdal aforesaid.

5. The said farm is worth, at least, £1,200, which sum was offered therefor about a year ago and refused as insufficient, and the said town property is worth about £200.

6. The debtor has recently paid off, or arranged to do so, two bonds on the said farm amounting to about £800 (eight hundred) in the whole, and has within the last day or two, as your petitioner has been informed, by one Hendrik, the agent for the debtor in the matter, and believes, agreed to sell the said farm for £700 (seven hundred), and has raised, or arranged to raise, £200 on a first mortgage of the said town property for that amount.

7. By reason of the premises your petitioner says that the said sale of the said farm is made at a considerable undervalue, and that the same and also the mortgage on the Jacobsdal property is made with intent or in such manner as to defeat or delay the debtor's creditors in obtaining payment of their debts, and is an act of insolvency; and your petitioner further says that if the said sale be allowed to proceed and transfer of the said farm be given, the liabilities of the debtor as aforesaid exceed (and did at the time of such sale exceed) his assets as aforesaid, and the estate of the said Hendrik Christian Pretorius is insolvent; and your petitioner and the said Edward Eager Hurly will suffer irreparable loss and damage, and be remediless in the premises if the said estate be not sequestrated.

8. Your petitioner is desirous of taking proceedings against the debtor in this Honourable Court for the compulsory sequestration of the estate of the debtor in this colony, in order that the said farm may be realised at a proper price for the benefit of the creditors generally of the debtor, and your petitioner says that it is for the benefit of such creditors that the estate should be so sequestrated, but, in order to do so, it is necessary to attach the said farm, to give this Honourable Court jurisdiction over the said Hendrik Christian Pretorius and his estate

The petitioner prayed for an order that:

1. The said farm be attached to found jurisdiction as aforesaid.

2. That the estate of the said Hendrik Christian Pretorius may be sequestrated for the benefit of his creditors.

3. That the said Hendrik Christian Pretorius be restrained, by a temporary interdict, from selling, transferring, mortgaging, alienating, or otherwise disposing of or dealing with the

imprisonment applies only after distribution of estate. The judgment might be barren—but we are entitled to claim it as in *C.G.H. Bank v. Melle* (3 Sheil. 299).

Mr. Justice Solomon: My difficulty is that the 71st section of the Insolvent Ordinance makes any dealing by the insolvent, without the consent (in writing) of the trustee, whether for himself or others, an act of culpable insolvency. Doesn't that prohibit any dealings?

Cur. ad. vult.

Postea (August 12.)

The appeal was allowed with costs.

The Acting Chief Justice: In this case the defendant sued the plaintiff in the Magistrate's Court at Knysna for the balance of a shop account for goods sold and delivered. The defendant excepted or it would be more correct to say pleaded that the plaintiff was not entitled to sue him because he was an insolvent. The evidence showed that in the year 1895 defendant's estate was sequestrated and that two meetings of creditors were called, at which no creditors were present. The Magistrate held that this insolvency was a bar to the action, and sustained the plea and dismissed the case. In our opinion the Magistrate erred in this respect. The account sued upon was a debt incurred after the insolvency, and consequently the plaintiff was not a creditor under the insolvency; nor could he prove under such insolvency. No doubt any person dealing with an insolvent, in whose estate no account has been filed, deals with him at his own risk, but it is no answer to an action for the defendant to say, I am insolvent and you cannot sue

Under the 49th section of the Insolvent ordinance, an insolvent, even though the account his estate has not been filed, can acquire property through money earned by his personal labour, &c., and it may be that if he enters into contracts with other persons, that property may be executable. Under the circumstances the defendant cannot therefore set up any rights that the trustee in his estate might have as a bar to the proceedings brought against him. In two previous cases the Court has distinctly decided that under these circumstances the defendant can be sued. Therefore, according to previous decisions, and according to our reading of the present Ordinance, we think the Magistrate ought to have overruled the exception; whether it is any use the plaintiff suing the defendant is quite another matter. The defendant cannot take out execution against any assets which may vest in the trustee of the insolvent. The question arose whether section 71 does not bar an insolvent from buying and selling goods. But the Court is of opinion that the intention of that section is to prevent the insolvent entering into trade without permission of his trustee, but that it does not apply to a case where the insolvent buys necessaries for his own use. The Magistrate's decision will be reversed, and the case will be remitted to the Magistrate to be tried on the merits. The appeal will be allowed, with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

MICHAELIS v. PRETORIUS. { 1896. Aug 12th.

Appeal—Attachment to found jurisdiction—Rule *nisi*—Interlocutory order - Interdict—Insolvency—Act committed outside Colony—Peregrine - Residence in Colony - Immovables in Colony - Ordinance 6 of 1843, section 4.

M., *a foreigner domiciled in the Orange Free State, applied to the High Court of Griqualand West for an order for attachment of a certain farm in the Colony to found jurisdiction in proceedings for the sequestration of the estate of* P., *who was also domiciled in the Orange Free State.*

The claim against P. *arose on a contract made and to be performed in the Orange Free State.*

The High Court refused to grant the provisional order of sequestration but issued a rule nisi *(to operate as an interim interdict in restraint of alienation of the farm) "pending further proceedings for the recovery of the debt alleged to be due . . . or for the sequestration of the respondent's estate or otherwise."*

G. *had (prior to the rule being granted) bought the farm from* P. *though he had not received transfer. It was alleged that the*

of £600, or thereabouts, the other, also about two year ago, containing the original homestead and buildings, for the sum of £700 or thereabouts, paid partly in cash and partly in kind.

8. I further say that the sale of the said farm to the said Pieter Theunis Blomerus Geldenhuys was made in a *bona-fide* manner, and without intent to defeat or delay my creditors, and was done to avoid further action and costs being incurred by the bondholders.

9. That beyond the said farm Goede Hoop I own no property in this colony, and there are no other unsecured creditors, and I say that the sequestration of my estate will not be for the benefit of any of my creditors.

10. Lastly, I say that the said farm Goede Hoop was sold subject to a certain lease which does not expire until the end of March, 1897, when (and not before) possession of the farm be taken by the purchaser thereof.

On the 6th July the High Court granted a rule *nisi* as follows: That a rule *nisi* do issue calling upon the respondent and all parties concerned to show cause, if any, why he should not be restrained from alienating farm Goede Hoop H No. 110, situate in the division of Herbert, pending further proceedings for the recovery of the debt alleged to be due by the respondent to the petitioner, or for the sequestration of the respondent's estate or otherwise. Rule to operate as an interim interdict, and to be served on the respondent; on the Registrar of Deeds, and, if possible, on the purchaser of the property in question, and to be returnable on the next provisional day, 15th July, 1896, when applicant to be at liberty to apply for such further relief in the premises as he may think fit.

The rule to be issued only on security for any interim damages which may be caused thereby being given to the satisfaction of the Registrar of this Honourable Court.

On the return day the rule *nisi* was discharged by the High Court.

The following were the learned Judge-President's reasons:

Laurence, J. P.: In this case an *ex parte* application was made to the Court in Chambers for the attachment of a certain farm, the property of the respondent, to found jurisdiction, for the compulsory sequestration of his estate, for an interdict against the alienation of the said farm pending proceedings for sequestration, and for leave to sue by edictal process for such sequestration. The Court then intimated that, in view of the facts that the two parties were both *peregrini*, and that the applicant's claim arose on a contract which had been made, and had to be performed, in a foreign State, it felt grave doubt whether the applicant should not be left to obtain his remedy in that which was *prima facie* the appropriate forum, namely, the Courts of the Free State. We declined in the circumstances to make a provisional order for compulsory sequestration, but, in the special circumstances alleged, we granted a rule *nisi*, to operate as an interim interdict against the alienation of the property in question, pending such further application in the premises as the applicant might be advised to make on provisional day, the rule to be issued only on the applicant giving security for any interim damage to the satisfaction of the Registrar. We are now asked to make the rule absolute, and it is contended that sufficient cause has been shown for the Court to grant an order for compulsory sequestration. Should such order be granted, the effect apparently would be to very seriously prejudice the interests of Mr. Geldenhuis, who, in the circumstances set forth in the affidavit, has bought and paid for this farm, and to whom it would already have been transferred had it not been for the interim interdict. Should the colonial estate be sequestrated, Geldenhuys would, on the principle laid down in the leading case of *Harris* v. *Buissinné's Trustees*, be merely in the position of a concurrent creditor for the amount of the purchase money. Now the applicant relies entirely on section 4 of Ordinance 6 of 1843, which provides that "if any person having any property, movable or immovable, within this colony . . . . shall make, either within this colony or elsewhere, any alienation, &c., of any of his goods or effects, movable or immovable, with intent or in such manner as to defeat or delay his creditors in obtaining payment of their debts, or with intent to prefer one creditor before his other creditors, such person shall be deemed thereby to have committed an act of insolvency." Now the wording of this section, and the jurisdiction thereby conferred, is certainly *prima facie* very extensive, but I am not satisfied that it should be construed, or that it has ever been construed, as involving an extension of, or a departure from, the ordinary principles as to the extent to which, and cases in which, the Colonial Courts will exercise jurisdiction over the person and property of foreigners. Apart from this, however, I am by no means satisfied on the facts now before the Court, that the object or effect of this alienation was to defeat or delay the respondent's creditors in obtaining payment of their debts, or with

intent to prefer one creditor before the others, or that it would be for the benefit of the creditors for an order to be granted for the sequestration of the Colonial estate. On the contrary, it seems to me that there is reason to believe that the respondent in good faith took the best steps he could to meet the claims of the mortgagees, by whom proceedings had been instituted: if he had not taken these steps and had allowed those proceedings to continue, there is no reason whatever to suppose that, after the mortgagees had been paid, and the local expenses met, there would have been anything left, out of the proceeds of a forced sheriff's sale, towards satisfying the applicant's claim. The applicant, on the other hand, has certainly not been vigilant in prosecuting that claim: it is based on a promissory note, which appears to have been long overdue, on which he might long since have obtained judgment in the Free State, and, had that judgment led to an insolvency in that State, steps might then have been taken, and an application made, if necessary, to this Court, to realise any assets within the Colony. If the granting of the present application is to be regarded as discretionary, the maxim, *vigilantibus non dormientibus aequitas subvenit*, would certainly seem to apply. When we refer to the decided cases, it is clear that there is no substantial distinction between the present attempt to get the Court to exercise this extraordinary jurisdiction and that which failed in *Wilhelm* v. *Francis* (Buch., 1876, 216), beyond the fact that the property within the Colony is immovable property. But on the whole I agree with Mr. Burton's contention, that this should make no difference except when the action is *in rem*, or when the property is itself *res litigiosa*, which is not the present case. *Wilhelm* v. *Francis* was followed in the case of *Einwald* v. *German West African Company* (5 Juta 86), when the Chief Justice laid down that the Court would exercise its jurisdiction only in cases in which the defendant was domiciled in the Colony, or the contract was made or had to be performed here, or lastly, "by virtue of the subject matter in an action *in rem* being situated in this colony" (p. 91)—in cases, for instance, similar to that in which we allowed this same property to be attached, and the present respondent to be cited, at the instance of Messrs. Hirsch, Loubser & Co., to whom it had been mortgaged. For these reasons, I am of opinion that the rule should be discharged; but in view of the pecuniary relations between the parties, and of the fact that there were circumstances connected with this sale which I think on the whole have been satisfactorily explained, but which may be said to have afforded some *prima facie* ground for inquiry and investigation, the case seems to be one in which nothing need to be said about costs.

Against this decision the matter now came before the Supreme Court on appeal.

Mr. Innes, Q.C. (with him Mr. Molteno), for the appellant.

Mr. Schreiner, Q.C. (with him Mr. Benjamin), for the respondents.

Mr. Innes: The rule *nisi* should have been made absolute pending either the sequestration of the estate here or in the Free State whichever was first. We appeal against the order discharging the rule.

Mr. Justice Maasdorp: Where an interdict is granted pending an action is that appealable?

Mr. Innes: We urge that it is. The original application was for sequestration: it was refused. The rule granted was extraordinarily wide—and it should have been continued either till further proceedings for sequestration in Colony were taken—or at least till the proceedings in the Free State for sequestration were settled. The special point for decision in this case is—can one foreigner sequestrate estate of another in this colony where both parties reside out of the Colony because of an act committed out of the Colony? Under the present English Bankruptcy Act (of 1883) the question would not arise, as that Act requires the debtor to be domiciled or resident for a given time in England. But under the former English Act (of 1869) there was no such qualification, and these two cases are useful as elucidating principles of jurisdiction. *Ex parte Crispin* (8 L.R., Chan. App., p. 374), definition defining what a debtor is; *Ex parte Blaine* Sawyers, 12 Ch. Div., 522); *Ex parte Pascoe, in re Meyer* (1 Ch. Div., 509). We can't allege positively that the act of insolvency was committed in the Colony—the evidence was as much one way as another. The parties appear to have signed documents in the Colony and therefore to have completed the Act here—and in regard to land in the Colony.

Mr. Justice Solomon: Must you not first establish that the act of bankruptcy was committed in the Colony, not that it was completed in the Colony?

Mr. Innes: In view of the English cases I think we must admit that the act must be shown to have been committed here. The wording of our section 4 differ considerably from the corresponding clause in the English Bankruptcy Act of 1883 which only refers to acts done by a *debtor*. Our section refers to *any person* having any property, movable or immovable, in the Colony.

Mr. Justice Solomon: Don't the words "leaving the Colony, remain out of the Colony" show that the whole section refers to persons residing in the Colony only.

Mr. Innes: That may be so in regard to those acts of insolvency, but as to the act of "alienation" no residence in the Colony is required. *Einwald's case* (5 J., 85) was much relied on in the Court below as to the grounds for jurisdiction.

Mr. Justice Buchanan: Sequestration is but a means of execution.

Mr. Innes: Yes, but it was a means which fell outside Einwald's case. This is not an action *in rem* in regard to this farm—and the property could not have been attached. A second point for decision in this case is—should not this rule have been made absolute pending the sequestration? Suppose proceedings are taken in the Orange Free State for sequestration of person domiciled and resident in Orange Free State, would not this Court come to assist to prevent fraud? *In re Clark Zoutpansberg Co.* (9 J., 197) shows that this Court will assist and give *locus standi* to liquidators or trustees of a foreign insolvent estate to sue for *movables* in the insolvent estate in the Colony. Will it not also recognise *locus standi* to sue for immovable? In *In re Zeederberg* (5 Searle, 3 7), assistance of this kind was given by restraint of alienation. *Voet* 42, 7, 2.

Mr. Justice Solomon: It seems to me that the only ground for such an order is that the property vests in the trustees.

Mr. Schreiner: Section 15, Act 5, 1879 says that no interlocutory judgment to be appealed against till leave is given. This is such a judgment and there is nothing to show that leave has been given.

Mr. Justice Maasdorp: Of course there was nothing to prevent the parties beginning *de novo* here.

Mr. Schreiner: *Crispin* and *Blaine's* cases are directly in point. Section 4, Ordinance 6, 1843, uses the words "his creditors." These cases show that in an application of this sort there must be a *creditor having a claim*. *Pascoe's* case is earlier than *Blaine's* and not important in view of our own case of *Einwald*. To get at immovable property in Colony the proper course would be to get a judgment in the Orange Free State and then sue on the judgment here.

Mr. Justice Solomon: But would not that be to raise the question of jurisdiction here again?

Mr. Schreiner: That would almost be so but for the peculiar virtue always assigned to foreign judgments. To these the character of a quasi-contract is in Nelson's *Private International Law* (p. 362) assigned. *Einwald's* case clearly shows there is no initial jurisdiction here. The appellants ask for an interdict to be made absolute; but it must be founded on a clear right within the jurisdiction. *Voet* (42, 1, 41); *De Flor* v. *Birmingham* (34 L.T. Reports, p. 638); *Rossillon* v. *Rossillon* (42 L.T.R., 684); *Schibsky* v. *Westenholz and Others* (L.R., 6 Q.B., 155); *Acutt, Blaine & Co.* v. *Commercial Mar. Ins.* (1 J. 402); *Lipman* v. *Kohler* (5 J., 42); *Bank of Africa* v. *Hare* (3 H.C., 286).

The Acting Chief Justice: It does not appear to me that there any grounds for sustaining this appeal. According to the statute no judgment, decree, or order by consent of parties, and no interlocutory order shall be the subject of any appeal without leave of the Court granting the same. In this case there was not even an interlocutory order in the Court below. But on the merits no case has been made out. An application was made to the High Court to attach certain property to found jurisdiction for further proceedings. The plaintiff and defendant were both residing in the Orange Free State, out of the jurisdiction of the Court. The contract between them was not entered into in the Colony, and was not to be performed in the Colony. Previous decisions of the Court have laid down distinctly that under such circumstances the Court will refuse to grant an order of attachment in order to found jurisdiction. On the merits therefore the appeal must fail. The appellant's object in securing the attachment, was to obtain an order for sequestration of defendant's estate on the ground that an act of insolvency had been committed. The learned judge in his reasons given in the Court below, said he was not satisfied that any act of insolvency had been committed in the Colony. On this point I quite agree with him. The order of the Court below was not made with costs, so that there is absolutely nothing before the Court. The appeal is, therefore, dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, D. Tennant, jun.; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

MOSENTHAL V. HASSELBACH. } 1896. Aug. 13th.

Mr. Benjamin applied for final adjudication of the respondent's estate. The provisional order was granted on July 23 last, defendant owing to plaintiff a sum of £6,022 4s. 10d., with interest and costs of judgment obtained.

Mr. Graham appeared for the respondent.

The application was granted.

Acting Chief Justice: Under Act 38 of 1884 a creditor may obtain the sequestration of his debtor's estate on two grounds: First, that the creditor shows that the estate is insolvent; and, secondly, that it is for the benefit of creditors that the estate should be sequestrated. In this case it is clear that it would be for the benefit of the creditors that the estate should be sequestrated. The only question is, has the applicant shown that the respondent is insolvent? When the provisional order was made it was shown that since February, 1895, respondent acknowledged that he was unable to pay his indebtedness to the applicants, and had applied to the applicants for time and forbearance, which was given on certain conditions; but these conditions were not kept. The respondent now contends that the terms were unreasonable, and afterwards closed his business with the intention, as he said, of going to Cape Town to arrange matters. Applicants sued for provisional judgment for £1,000 on overdue promissory notes. Defendant made no defence, and judgment went by default. This judgment has not been settled. Taking all the circumstances into consideration, the Court thinks that sufficient has been shown by the applicants to justify the sequestration of the estate on the grounds that the respondent is insolvent and that a sequestration would be in the interests of the creditors. The rule *nisi* is made absolute.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Reid & Nephew.]

VAN DER BYL V. VAN DER MERWE.

Mr. Close applied for provisional sentence on a promissory note dated July 16, 1895, for £195 11s.

Granted.

GENERAL MOTIONS.

THE PETITION OF GERTRUDE F. C. SCOTT.

Mr. Graham applied for leave to sue by edictal citation in an action against her husband for divorce by reason of his alleged adultery, and also for the custody of the minor children of their marriage.

The Court granted the rule *nisi*, returnable on November 19; personal service if possible.

MASKEW'S EXECUTORS V. TRUTER'S EXECUTORS. } 1896. Aug. 13th. „ 14th. „ 31st.

Trespass—Prescription—Precarious occupation.

T. *was entitled to certain rights over the farm* M. *in terms of the will of his parents. One of the boundaries of the farm was the Olifant's River.*

T. *proceeded to cultivate a portion of land beyond the present west bank of the river, alleging that the river had changed its course.*

The Court *found that the river had not so changed its course and that* T. *had acquired no title by prescription to land across the river as he had held the same only on a precarious tenure, with the permission of the owners who were relatives.*

This was an action for declaration of rights as to the boundaries between the two farms Bakkley Plaats and Melkboom in the Van Rhyn's Dorp district.

Mr. J. Rose-Innes, Q.C. (with whom was Mr. Searle, Q.C.). for the plaintiffs. Mr. Graham (with whom was Mr. Smuts) for defendant.

The plaintiffs declaration was as follows:

I. The plaintiffs' are:—

1. Maria Maskew, William Henry Maskew, and Louis Henry Trollip, in their capacity as executors testamentary to the estate of the late William Wilson Maskew.

2. Gerrit Heremias Truter, a farmer, residing at Bakkley Plaats, in the district of Van Rhyn's Dorp.

3. Johannes Hendrik de Waal, a farmer, residing at Bakkley Plaats aforesaid.

4. Hermanus Gideon Marthinus van Zyl, a farmer, also residing at Bakkley Plaats aforesaid.

II. The defendants are:

1. Daniel Bartholomeus Truter and Ernst Hendrik Wolfaardt Truter, who are sued individually and also as executors testamentary

to the estate of their late mother, Christina Philippina Margaretha Truter (born Wolfaardt), and who reside at Melkboom, in the said district.

2. Petrus Benjamin van Rhyn, in his capacity as executor dative to the estate of the late Frans Johannes de Necker Truter, who was the father of the first two defendants.

3. Albert Cornelis van Zyl, Frans Johannes Truter, Alida Regina Truter, and Pieter Adriaan van Zyl, in his capacity as the executor dative to the estate of the late Albert van Zyl, who are joined in this action as joint owners in undivided shares of the farm Bakkley Plaats for the purpose of obtaining a declaration of rights, as hereinafter set forth.

III. The plaintiffs, together with the third-named defendants, are registered owners in undivided shares of the remaining extent of the original farm Bakkley Plaats aforesaid. The said farm adjoins the farm Melkboom, which originally formed part of Bakkley Plaats, but which is now registered in the name of the late Frans Johannes de Necker Truter, and which formed an asset in the joint estate of himself and his wife, the mother of the first-named defendants.

IV. The true boundary of the farm Melkboom upon its eastern and north-eastern sides is the Oliphant's River, which flows between it and the farm Bakkley Plaats, and no portion of Melkboom extends beyond the said river in the said directions.

V. The first-named defendants, who have certain rights in the farm Melkboom under the wills of their said parents, wrongfully and unlawfully contend that the boundary of the said farm extends beyond the Oliphant's River in the direction aforesaid, and at divers times between the month of May, 1895, and the present date they have wrongfully and unlawfully committed the following acts of trespass upon the farm Bakkley Plaats:

(*a*) They have ploughed a considerable portion of land on the said farm, and sowed crops upon it.

(*b*) They have depastured their cattle and erected kraals upon the said farm.

(*c*) They have cut down and removed a large number of thorn and willow trees growing upon the said farm.

(*d*) They have interfered with the watermill situate upon the said farm.

VI. By reason of the trespasses aforesaid the plaintiffs, who by arrangement between the co-proprietors of Bakkley Plaats are entitled to the sole use of the land upon which the said trespasses have been committed, have suffered damage in the sum of £500,

VII. On or about the 14th November, 1895, the first-named plaintiffs obtained from this Honourable Court an order interdicting the first-named defendants from entering upon or exercising any rights of ownership over any part of the farm Bakkley Plaats pending this action. The said order has been served upon the said defendants, but they have not desisted from their trespasses aforesaid.

VIII. Wherefore the plaintiffs claim:

As against the first and second named defendants,

(a) *An order declaring that the eastern and north-eastern boundary of the farm Melkboom is the Oliphant's River.*

(b) *An order interdicting the first-named defendants, both individually and as executors aforesaid, from trespassing upon any portion of the farm Bakkley Plaats.*

As against the first-named defendants,

(c) *Payment of the sum of* £500 *for damages aforesaid.*

(d) *Alternative relief and costs of suit, including the costs of the interdict hereinbefore mentioned.*

The following was the plea of the two first-named defendants, Daniel Bartholomeus Truter and Ernst Hendrik Wolfaardt Truter:

As a plea to plaintiffs' declaration the two first-named defendants say:

1. They admit paragraphs 1 and 2 of the declaration.

2. They admit the allegations of paragraph 3 of the declaration, subject to what is hereinafter said as to the true ownership of that part of Bakkley Plaats which lies to the east of the Oliphant's River.

3. As to paragraph 4 of the declaration they deny that the Oliphant's River forms the true eastern and north-eastern boundary of the farm Melkboom. They say that said river was the true boundary as aforesaid till the year 1843, when its course was changed, and that thereafter part of Melkboom lay to the east of the said river. They annex hereto as part of their plea a plan marked I, whereon the old and the new, that is to say, the present course of the river are respectively marked A.C B. and A.B., and the area bounded by these lines represents that part of Melkboom which has since 1843 lain to the east of the said river.

4. They say that they and their predecessors in title have, both before and after the said change of the river-course, occupied and cultivated the area marked A.C.B. uninterruptedly and as of right.

5. As to paragraph 5 they admit that, save as aforesaid, the farm Melkboom does not extend to the east of the Oliphant's River,

They, however, deny the alleged trespass, inasmuch as at the time and place of the acts of trespass they were and still are part owners and occupiers of the land.

6. They deny the allegations of paragraph 6 of the declaration.

7. They admit the allegations of paragraph 7 of the declaration, and say that they thought that their abandonment of those parts of Melkboom and Bakkley Plaats situate to the east of the Oliphant's River would prejudice their rights in this action.

Wherefore they pray that plaintiffs' claim may be dismissed with costs.

The two first-named defendants claim in reconvention as follows:—

1. They repeat the foregoing paragraphs of their plea in convention.

2. They say that by the joint will, dated August 10, 1830, and codicil dated December 16, 1837, of E. H. Wolfaardt and his spouse, their maternal grandparents, there was bequeathed to testators' daughter, Christina Philippina Margaretha, who was the mother of plaintiffs in reconvention, an undivided third share in the farm Zandkraal and in that part of Bakkley Plaats which lies to the east of the Oliphant's River, and which was commonly known and called by the testators aforesaid and their descendants as "Kambdouw's Land." The said will and codicil were duly proved, and a copy thereof is annexed hereto as part of the claim in reconvention, and marked H.

3. They annex hereto as part of this claim in reconvention a plan marked III, whereon are represented the new positions of the farms Zandkraal, Melkboom, and Bakkley Plaats, and of the Oliphant's River.

4. They further say that by the joint will of their parents Frans Johannes de Necker Truter and Christina Philippina Margaretha Truter (born Wolfaardt) as aforesaid, dated January 11, 1832, and duly proved March 8, 1852 the farm Melkboom together with the undivided third share aforesaid in Zandkraal and Kambdouw's Land aforesaid, passed into the joint estate of these testators, and that by arrangement with their sisters the right of disposing of the properties aforesaid passed to the mother, Christina Philippina Margaretha Truter.

5. They further say that by their said mother's last will dated May 4, 1891, and codicil dated January 23, 1892, duly proved March 10, 1896, copy whereof is hereto annexed as part of the claim in reconvention and marked IV, the ownership in Melkboom and the undivided third share in Zandkraal and Kambdouw's Land aforesaid passed to the children of plaintiffs in reconvention, subject to the usufruct of the latter, as will more clearly appear from the terms of the said will and codicil.

6. On these grounds plaintiffs in reconvention say that the true ownership in that part of Melkboom and in the undivided third share of that part of Bakkley Plaats which lie to the east of the Oliphant's River is vested in them for themselves and their children as executors testamentary under their late mother's will and codicil.

In the alternative they say that they and their predecessors in title have, for a period longer than the period of prescription, occupied and cultivated uninterruptedly and as of right those parts of Melkboom and Bakkley Plaats which are situated to the east of the Oliphant's River.

Wherefore they claim in reconvention against the defendants in reconvention, the plaintiffs in convention:

(*a*) An order declaring that a part of the farm Melkboom lies to the east of the Oliphant's River and belongs to the plaintiffs in reconvention as the representatives of their children;

(*b*) An order declaring that an undivided third share in Kambdouw's Land, that is to say, that part of Bakkley Plaats which lies on the east of the said river, is legally vested in the plaintiffs in reconvention as the representatives of their children.

(*c*) Alternative relief.

The following was the plaintiffs' replication and plea to the claim in reconvention of the two first-named defendants.

The replication to the plea of the first-named defendants was general. They specially denied that the defendants or their predecessors in title have acquired any right by prescription to the land claimed by them in paragraph 6 and they said that the plaintiffs and their predecessors in title have uninterruptedly and as of right occupied and cultivated the portion now claimed by the defendants. Wherefore they again prayed for judgment with costs of suit,

For a plea to the claim in reconvention they said:

1. They crave leave to refer to the matters pleaded in the declaration.

2. They deny that the plaintiffs in reconvention have any right either by virtue of the will of their mother or otherwise to the portion of the farm Bakkley Plaats lying to the east of the Oliphant's River, or to any land on the eastern side of the said river.

3. They deny that the documents annexed to the plea purport to grant the rights set up in the said claim, and for the terms of the said documents and the meaning thereof they crave

leave to refer to the documents themselves; they admit the execution of the said documents and that the same were duly proved.

4. They deny that the plaintiffs in reconvention have acquired by prescription or otherwise any rights to land on the east side of the Oliphant's River as set forth in the said claim, but they say that the defendants in reconvention and their predecessors in title have uninterruptedly and as of right occupied the said land.

5. Save as above admitted they deny all and singular the allegations of fact and conclusions of law in the said claim in reconvention and join issue thereupon and pray that the said claim may be dismissed with costs.

The rejoinder of the first-named defendants was as follows:

As a rejoinder to the defendants' plea in reconvention the two first-named defendants say that they join issue with said plaintiffs on all the allegations in said plea in reconvention, save in so far as the same contains admissions.

Wherefore they again pray for judgment on the claim in reconvention with costs.

On these pleadings issue was joined.

For the plaintiff.

William de Smidt, sworn Government land surveyor, said that about 1860 he accompanied Mr. Fletcher to inspect Government ground on the Oliphant's River. In the course of that inspection he went to the farms Bakkley Plaats and Melkboom. He surveyed the farms for the purpose of sub-division, and the plans produced were the result of the surveys. He asked defendants to show him the boundary of the land they claimed. One of the defendants said, vaguely, he claimed "All that." but made no more particular definition. There were no beacons thereabouts. In 1860, the river ran in the same course as it does now. The river overflowed at times, but there was no sign that the main channel had been different. There were no signs of any old channel. The river there was about 150 yards wide. The banks were about 15 feet deep, and the channel was 30 or 40 feet deep in parts. There was no sign of a similar channel ever having existed on the east side of Kambdouwsland. The piece of land was called the Kambdouwsland because it was cultivated and fenced. The soil was alluvial. If there had been an old channel where it was claimed, it would have to go right through where the house was, and over a hill 100 feet high. This was impossible.

Cross-examined: The old diagram showed the river much too far to the east. This diagram was drawn in 1837, but it did not show the present course of the river. He surveyed Melkboom for defendants in 1860 or 1870. He would not deny that defendants might have told him at that time that the cour e of the river had changed. He did not intend the garden marked green on the east of the river to be a portion of Melkboom. He had been told that the river had at one time flowed to the east of the present channel. The old diagram was erroneous. He made the survey 580 morgen, and the old diagram made it 623 morgen. He took the river as a boundary. Taking the alleged old course of the river it would make the quantity over 600 morgen.

Johannes Henry de Waal, one of the plaintiffs and a Field-cornet, said he lived on a portion of Bakkley Plaats, which he bought in 1877. Since he had known the locality the river ran in the same course as it does now. One of the defendants had cut down trees, and witness had remonstrated, when the defendant E. H. W. Truter said he was working on his mother's estate, Melkboom. Defendant claimed the piece to the east of the river as his mother's property. Witness had leased a portion of the land for five years, and the lease was still running, and included this piece of land. He told defendant that he was not to cut down trees or do anything to the land on the east side of the Oliphant's River. After this defendants dug out the roots of the trees and made a new garden there, and ploughed other parts and reaped the crops. Witness took the crops off a third of the ground. Defendants had allowed cattle to pasture on the ground on the east of the river. He thought damages had been done in the way of cutting down trees to the extent of £200. Fences and grazing would be worth together about £40.

Peter A. van Zyl, executor dative of the estate of A. van Zyl, one of the nominal defendants, said he knew the two farms, and had known the locality for twelve years. There was no trace that the river had ever changed its course. One of the defendants had told witness that his pugnacious old brother had induced him to go on with the action, knowing that they had no claim to anything on the east of the river. A document was signed by E. H. W. Truter, one of the defendants, in March, by which rights on the east of the river were to be given up. This defendant's brother, however, would not sign, so that efforts to come to a settlement without an action were of no avail.

Cross-examined: Witness was the local agent for the plaintiffs. He had lived on the Oliphant's River over ten years. He was in charge of a school on a farm near to the farm Bakkley Plaats for two years. He had no notion who worked the land on the east side of the river.

He never had occasion to ask ; the changing of the course of the river as alleged by the defendants was absurd. He had taken measurements in July, 1896, and saw no alteration in the channel. There was a hollow in the ground to the east of the river which might have contained water. The hollow united with the river both higher up and lower down.

Re-examined: The river would have to rise very much to get into the hollow, and would have to cover very high ground to get into the hollow. The land A B C was west of any of the land in dispute. He knew the Oliphant's River soil well, and when it altered its course it left dry white sand. There was no dry white sand near the land in dispute, which was alluvial soil. It was unusual for the Oliphant's River to change its course. It was very improbable that the river had changed its course and the white sand become covered with soil.

Mr. Innes stated that an old witness named Fortuin could not stand the journey to Cape Town, and the only way of obtaining his evidence would be to have him examined on commission. There was also another witness, Wolfaardt, who was in the Orange Tree State, and whom they had not been able to bring down. It would be important to get this evidence before the case was decided.

The Court said that the plaintiff's case would not be closed. Arrangements for further evidence to be taken on commission would have to be made; but defendant could go on with his witnesses.

For the defence,

Daniel Bartholomeus Truter, one of the defendants, said he was sixty-four years of age, and came to Melkboom when he was three years of age. His mother was a daughter of old Wolfaardt, who lived at Oliphant's River. He could remember his father buying Melkboom in 1837. In 1843 the river changed its course. His father occupied the piece of land on the east side of the river, and previously no one had interfered, except his uncle Albert Wolfaardt, who came in 1870, and claimed a part of the garden. He told Mr. De Smidt, the surveyor that the river had changed its course, and, pointed out to him the old channel. Signs could still be seen where the river used to run. The old bank, at least 10 feet high, was still visible. The old channel had been gradually filling up. In 1874 witness first became owner of a portion of Bakkley Plaats, but before that time he had the portion which his father had. The piece of land cut off by the river was 100 yards wide, and about 400 or 500 yards long.

Cross-examined: Before 1843 the river ran 150 yards east of its present course. Witness saw the river leave its old channel and take a new one. This took about four hours. The water flowed in both channels for about five years. The banks were about twenty-five feet high. The river was fifty yards wide. His father never lived at Bakkley Plaats. Old Mr. Wolfaardt gave witness's father permission to graze cattle on the east side of the river. Mr. Wolfaardt died in 1840 or 1841. Witness's father and the two Wolfaardts farmed the land on the east side of the river in one-third shares. His father worked the land alone until Wolfaardt came in 1870. Before the river changed its course, his father cultivated on the eastern side of the river. This was by permission of old Mr. Wolfaardt.

This witness recalled, stated that he was insolvent in 1880. He did not bring up the land on the east side of the Oliphant's River in the schedules which he furnished to the trustee. He had no vested interest until the death of his mother.

Josias van Zyl, a farmer who had lived at Elandsfontein, but now lived two and a half hours from Bakkley Plaats, said he was sixty-seven years of age. He had lived near the two farms, and went there at twelve years of age. He lived there up to his twentieth year with Franz Truter, the father of the two defendants. He was living at Melkboom Drift. He remembered the change in the channel of the river. The river was obstructed by stones and bush during a flood. This caused the old channel to be filled up. There was a great flood, and the river changed its course. There was a deep tributary running nearly parallel to the old channel, and ultimately the water formed a new channel at the bend. He knew the present course of the river, and had worked there when it was dry ground. There was a small garden there on the east side of the river. Kambdouwsland was on the east side, and both Mr. Truter and the Wolfaardts had cattle running there. The distance from the house to the old east bank of the river was seventy or eighty yards. Witness was no relation to any of the parties in the case.

Cross-examined: The river changed its course when he was between twelve and fourteen years old. He knew the old channel about a year before. Before the river changed its course it ran in one flow, but when there were floods the spruits were filled. There was a spruit between the eastern and western banks going through the land. The eastern bank was about fifteen feet high, and there was very little bank on the western side, which was sandy ground. The eastern bank was fifteen feet above the garden. There was still a narrow spruit on the

eastern side leading to the land, and used for the purposes of irrigation. The spruit was there before the river changed its course, but water did not now run in it unless the river rose high enough.

Re-examined: The spruit on the east side of the river only holds water in time of flood.

By the Court: The length of the spruit he guessed at 500 yards. The width in the middle might be 200 yards. The river now is broader than it was before, and the new channel is straight, and cuts off the old bend.

Ernest Hendrik Wolfaardt Nieuwoudt said he was fifty-six years old and was born at Bakkley Plaats. His father bought E. H. Wolfaardt's share in Bakkley Plaats in 1845. Witness lived there up to 1872. He was well acquainted with the farms in dispute. He heard that the river had changed its course. His father told him, and showed him the spot where the change took place. He knew the river boundary of Melkboom. The old course of the river is still visible, and the old eastern bank could be seen. As long as he could remember the ground on the eastern side of the river was worked by Ernest P. Wolfaardt, who was a poor man, and Mr. Truter placed him there. The island was worked by the present defendants. The island was on the east of the river, but was west of the old bank. Witness's father told him he owned a third share in Kambdouwsland. His father and the Truters ran cattle on this land on the east side of the Oliphant's River.

Cross-examined: He had know Melkboom since he was four years of age. At that time the defendant lived there with his father. There were beacons which marked the boundaries on the east side of the river. All the witnsses must know the boundaries of Kambdouwsland. The old course of the river was quite plainly to be seen, and all the witnesses ought to be able to see it. As to Mr. De Smidt, what did he know about the Oliphant's River? The western bank of the old channel was a gradual slope. He could not give the height. The bank was covered with trees. The western bank of the old course was well defined for 500 yards.

Re-examined: Witness again lived at Melkboom in 1888, and stayed there until 1893.

E. H. Wolfaardt Truter, one of the defendants, said he was sixty years of age, and had lived at Melkboom since his birth. When he was four years of age his father told him the river had changed its course. The old bank was still visible.

Cross-examined by Mr. Searle, Q.C.: He knew the old channel well, and could point it out to everybody. He was not insolvent yet. He remembered asking Mr. Van Zyl to write the letter referring to a settlement. He went on cultivating after the interdict had been served, because he knew it was his own property. He gave up possession last April.

Christina Maria Derrenberg, widow, residing at Van Rhyn's Dorp, said she was sixty-five years of age. She knew the farms Bakkley Plaats and Melkboom. Her father had a garden on the eastern side of Melkboom—on the land Kambdouwsland. Franz Truter gave her father the right to go there. Where the river used to flow is now gardens. The change took place when she was living in the locality. She was at school when the change took place, but saw that the riv r had taken the new course on her return. She was then ten or eleven years of age. Witness was no relation of the parties.

Cross-examined: Before the river changed there were spruits there. Her father was a "bywoner" to Mr. Truter, who lived at Melkboom. Where the river formerly ran formed a large piece of ground. The old channel of the river was not so broad as the new one.

Sidney Samuel Jacobson, articled clerk to Mr. Montgomery Walker, said he prepared a tracing of a diagram put in, and the tracing was a correct copy. The certified copy already in was not quite exact.

Mr. Innes, Q.C., applied for leave to take the evidence of one Felix Fortuin on commission.

Mr. Graham also applied for leave to take the evidence of Albertus Schroeder, who lived in Namaqualand, on commission.

The Court granted a joint commission *de bene esse*, to take such evidence as plaintiff or defendant might tender; the Resident Magistrate of Van Rhyn's Dorp to be commissioner.

The further hearing of the case was adjourned until the last day of term.

Postea (August 31).

The following further evidence was adduced:

Albert Sebastian Wolfaardt said he was the only surviving son of the original grantee of the farm Bakkley Plaats. He was seventy-one years of age. He lived at Hoopstadt in the Free State, and was a J.P. When he was born his father was living at Clanwilliam, and when witness was young his father removed to Piquetberg. They returned to Bakkley Plaats when witness was twelve years of age. His father had Bakkley Plaats before witness was born. Mrs. Truter was witness's youngest sister. Mr. and Mrs. Truter went back to the farm with witness's father in 1837. Witness was sixteen years old when his father died, near Clanwilliam. After his father's death he and his brother con-

tinued to farm Bakkley Plaats, and their mother lived with them until she died. The Kambdouw gardens were then in existence, and the photographs of the locality produced were correct. Six years ago the river had the same course as it had in 1837. The spruit was on the low portion of the ground, near the river, upon which gardens were made. When he first remembered the place it was a hollow, in which reeds grew; between this spot and the river there were gardens. There were trees there when he first knew the river.

Cross-examined: He first heard of the present case eight days ago. When he first knew the neighbourhood, no portion of the ground on the west side of the river was known as Kambdouwland. The drift was close to the upper side of the land. Bakkley Plaats was a good deal more valuable than Zand Kraal. He could not tell the value of Kambdouwland with Zand Kraal. His father never worked land on the other side of the river. He never left Bakkley Plaats between 1837 and 1870. He had a dispute with Mr. Truter, but this had nothing to do with witness's trekking to the Free State. The dispute arose through their claiming one-third of the Kambdouwland. His brother long ago gave old Truter permission to work the gardens for a year. Witness's father, brother-in-law, and another person cleared the land. This was before the birth of witness. Daniel Truter first claimed a third share in the Kambdouwland in 1870. The Oliphant's River sometimes washed a little broader, but never changed its course.

Re-examined: The river sometimes washed away portions of its banks. The west bank was higher than the east near the Kambdouwland. There were small sluits which ran into the river near the Kambdouw house. These sluits brought down *débris* and deposits, and in this way the land became cultivatable.

The following evidence was taken on commission:

Before me Mr. Hugo, Resident Magistrate of Van Rhyn's Dorp in terms of commission from the Supreme Court dated the 14th day of August, 1896, the 25th day of August, 18.6.

(Mr. P. A. van Zyl appears for the plaintiffs. Johannes H. de Waal also as co-plaintiff. Mr. L. H. Pocock appears for the defendants, Daniel B. Truter and Ernest H. W. Truter).

Felix Fortuin, who being sworn states: I reside at Ebenezer in this district. I was born in 1818. I know Messrs. Daniel and Ernest Truter and their late father, also the old Wolfaardt who formerly lived at Bakkley Plaats. I am well acquainted with Bakkley Plaats, Kambous, Melkboom, and that neighbourhood. I was about twenty years of age when I came to the Oliphant's River. My father lived opposite Melkboom, on the eastern side of the river. I was my father's shepherd at that time. I used to graze my stock along the Oliphant's River as far as Kamboushoek. My father lived there two years. I know the course of the Oliphant's River well—where the course of the river was at that time it still is at the present day. I was at Kambous last Friday, when Mr. Burnett took certain views of the Kambous house and gardens. The first view represents the Kambous house, lands and garden. The second view was taken from the western side of the Oliphant's River towards the house at Kambous. The third from Melkboom house. I was not present when *this* view was taken. Views put in (A). The land known as Kambous lies on the eastern side of the Oliphant's River in front of Kambous house. There was a spruit half way up along the Kambous land or garden; the spruit comes from the lower side for a distance of about 500 yards; at the lower end where it joins the river F on photograph it stretches back in the direction of B. When the river is in flood this spruit and similar ones are inundated from below. Formerly this was so, not now. After water had subsided, after a flood, it left pools of water where rushes and reeds grew in the spruit. in exceptionally high floods this spruit would still be inundated from below—but with ordinary floods when the water does not rise above the banks this would not happen. About half way up the spruit there is now a small island spruit. The spot with high trees shown on viewE was the bank the river when I lived at Bakkley Plaat, with my father. The land marked C silted there afterwards. Later on I was Mr. Field-cornet Albert van Zyl's skipper, and every year passed up and down at this place. The original or old bank of the river as shown by the large trees is higher than the island marked C, and about 16 or 17 feet above the level of the water. Where the island C now is was formerly water; there were a lot of "rivier" willows growing there, and in course of time this island was formed there of clay and sand. This island or piece of ground (C) is about thirteen yards broad and about 200 yards long. This island or piece of ground or deposit of ground was formed by a wash-up from the river. The pools in the spruit have silted up with sand and stones from the "veld"—after heavy rains it was washed in or carried down, filling the pools and leaving banks or mounds of soil, crossways in the spruit. I produce a sample of the ground taken from this spot (No. 1,) No. 2 soil I took from the western bank of the river opposite the "Bruin Krantz" L, on photograph No. 2, I took from

the upper part of the spruit at three different places 20 and 30 yards apart, between B and G, the alluvial soil produced (No. 3). Whenever the channel shifts within the banks of the river, it leaves white sand behind. In my recollection the Oliphant's River never had any other course or channel but the present one. The area marked C was formerly water. I passed over it with the boat. This area marked C with the present river was formerly the course or channel of the river; the channel was narrower in the early days than now by about twenty yards. It was in later years that the water took away some of the western bank and so widened the channel of the river. I lived six years on Bakkley Plaats and Zandkraal. At the "Bruin Krantz" L, photograph No. 2, below the old spruit the water is up against the krantz and is very deep. If Mr. Ernest Truter says there is "drooge ground" there he tells an untruth. From what I can remember Messrs. D. and E. Truter's parents trekked into those parts with their families when I was at Zandkraal. I judged them at the time at about eight or nine years younger than I was. They were boys, I was twenty years of age.

Cross-examined: I was born at Matjesfontein higher up along the Oliphant's River, and christened at Ebenezer. I do not know how old I was at the time I was christened. I was at that time a boy. I cannot recollect when I came to Ebenezer. I do not know how high, or tall, at that time. I was unmarried when I worked for Messrs. Daniel and Ernest Truter and married while in their service. I cannot recollect when I came into their service and how many years I worked for them. I lived at Ebenezer when I worked for the Truters. I cannot read or write. I saw the photographs produced at Mr. Van Zyl's office this morning. Mr. De Waal was present. He showed me the course of the river, not the island. The soils produced I took from the different spots myself. Mr. De Waal told me to get some soil from the garden and river and the soil washed in from the veld. I have grown up alongside the Oliphant's River. It does not wash away (verspoel). I do not recollect a big flood as a young man when the river overflowed its banks. I do not know that the river had changed its course. I do not know how the ground now in dispute was utilised. I never worked on this ground. My father was six years in the service of the late Mr. Wolfaardt. When that expired we left, I do not know how old I was at that time. I was unmarried. I have not seen my eldest child for thirty or forty years. I do not know her age. I cannot remember dates. I know of no big wash-away. The Oliphant's River has never changed its course.

Re-examined: After a very heavy flood when the river overflows its banks, it takes about seven or eight days for the water to recede and obtain its natural flow.

By Commissioner: I was born at Matjesfontein on the farm of Mr. Gert Nieuwoudt, and he told me that I was born in 1818. I was christened at Ebenezer by the Rev. Mr. Suntz.

After argument,

The Acting Chief Justice, after stating the pleadings, continued: When the case was put before the Court the plaintiffs' witnesses stated that the Oliphant's River had not changed its course as long as they had known the farm, Bakkley Plaats. None of these witnesses, however, could speak of a period anterior to 1870. In that year Mr. De Smidt, the only professional witness called, stated he had surveyed the adjoining ground, and he had previously specially inspected the river for Government, and he not only said that the river had never taken the course claimed by defendants, but that in his opinion from the physical aspect of the country it was impossible for it to have done so. Defendants' witnesses, however, said that in 1813 the Oliphant's River had made a certain deviation. On the diagram attached to the original grant the river is merely sketched in. Mr. De Smidt has laid down on his plan the course indicated in the original diagram, and though it shows at one place a bend which to some extent supports defendants' case, it, lower down the river, takes off a large slice of land, admittedly the defendants' property. Since the adjournment two independent witnesses have been examined, one on commission and one in court, and they are both against the defendants' contention. Mr. Wolfaardt, who gave his evidence in a very fair and convincing manner, is clear that the river has not changed its course in his recollection, which extends back to 1837. The difficulties of the case have been greatly cleared away by the photographs which have also been put in since the adjournment. These show no indication whatever of an old western bank of the river where defendants say the river formerly ran, and the present western bank is higher than the eastern bank. It is quite possible and indeed probable, that in pre-historic times the river when at its flood spread over a large extent of country in the direction claimed by defendants, but judging from the photographs, if that was so, there has been a gradual narrowing of the channel of the stream, and not any sudden change of its course as set up by defendants. With this evidence before us I think the defendants have failed to discharge the onus they were under of proving the diversion of the river. The plain-

tiffs therefore are entitled to an order declaring the river as it now is to be the boundary of their ground. This being so the defendants committed a trespass on the eastern side of the river. They justify this trespass by setting up a prescriptive right of occupation. But they have not proved such occupation as would support this defence. The evidence shows that the whole property formerly belonged to one person, and that it was occupied with his permission as a family farm by his children and descendants. There was no adverse user of any particular portion such as would establish a right by prescription. The defendants in their claim in reconvention further allege a bequest to them of this ground. This claim is founded on the words used in the codicil, which I think were intended merely to indicate where the land given was. The testator by using the words "situated in the Kamkous country," did not, I think, intend to give any land beyond that specifically mentioned. What defendants contend is, that the Kamkous country was the land adjoining the river on the western side, and consequently a portion of that land was intended to be attached to the land bequeathed. A glance at the diagram shows how unlikely it is such a bequest could have been intended. The will is dated 1837, and since then there have been numerous transfers of the land now claimed. These transfers have never been previously assailed, and no steps taken during the long period of years to have any of the series rectified. The land bequeathed was taken possession of and transferred several times, and it would require a much stronger case than has been made out to show that the words "in the Kamkous country" really mean land which was not included in any of the transfers passed since the will came into effect. I think, therefore, the defendants have failed in every point. There will be judgment, therefore, for the plaintiffs in convention as prayed (as to the declaration of rights) declaring that the eastern and north-eastern boundaries of the farm Melkboom is the Oliphant's River, and damages against defendants for trespass, £25 and costs; the plaintiffs to be allowed witnesses' expenses. In reconvention judgment will be also for the plaintiffs (defendants in reconvention), with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, G. M. Walker.]

SUPREME COURT

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

Re CORNELIS PETRUS ENGELBRECHT. } 1896. Aug. 14th.

Upon the application of Mr. Buchanan, Cornelis Petrus Engelbrecht was rehabilitated.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE GABRIEL NEL.

Mr. Molteno applied for an order relieving the executrix dative of the said estate of her trust, as by reason of her advanced age she is unable to manage her own business or that of the said estate.

The Court granted the order, and the Master was authorised to take the necessary steps in the matter.

ALIWAL BOARD OF EXECUTORS V. BOSS.

Mr. J. Rose-Innes, Q.C., applied on behalf of the defendant for an order postponing the trial of the suit between the parties, which has been set down for the 26th inst., to a later date, as defendant is in England, and has been unavoidably detained by illness in his family.

Mr. Searle, Q.C., appeared for the respondent. He opposed the application unless the defendant definitely agreed to go to trial within the first seven days of next term.

The application was granted on condition that the defendant go to trial within the first seven days of next term. Costs to be costs in the cause.

THE PETITION OF GEORGE F. W. O. KETT.

Mr. Close applied for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion.

The application was granted, the edictal citation to be returnable on November 5; the wife to be provided by the husband with means to come out from England if she should desire to do so. Personal service to be effected.

IN THE ESTATE OF THE LATE JAFTA NYAVRI.

Mr. Benjamin applied to make absolute the rule *nisi* for transfer to the sons of the said Nyavri of certain perpetual quitrent farm in the district of Matatiele, East Griqualand, being portion of the land known as

Driefontein, the said farm having been declared to be according to native custom the joint property of the said sons.

The Court ordered the rule *nisi* to be made absolute.

IN THE ESTATE OF THE LATE ABRAHAM J. ABRAHAMSE.

Mr. Jones applied for authority to the executors of the said estate to obtain title of certain land with two houses thereon, situated at Woodstock, purchased by the said Abrahamse, and bequeathed by him to his three minor children subject to conditions in favour of their mother, it being desired to transfer the same to the said minors and pass a bond to secure the balance of the purchase price.

The Court granted the order, and permission was granted to the executors to pass a bond; costs and charges to be paid out of the funds in the estate.

IN THE ESTATE OF THE LATE JOHANNES A. HURTER.

Mr. Buchanan applied for authority to the Registrar of Deeds to amend certain deed of transfer relating to the quitrent place Annie's Grave, formerly Riet Rivier, in the division of Uitenhage, by describing it as a defined share of the said property, instead of an undivided half-share, the fact of the sub-division having been overlooked by the conveyancer when drawing the deed in 1880.

The Court granted an order as prayed.

THE PETITION OF MONDEL SAPIERS.

Mr. Graham applied for a rule *nisi*, operating in the meanwhile as an interdict, restraining John Marnewick from obtaining transfer of certain lot of ground marked No. 16, in the village of Dysselsdorp, pending an action to be instituted by applicant to have it declared that he is entitled to have a right of way registered against the title of the said lot.

The Court granted a rule *nisi*, returnable on the 27th August, as prayed.

REGINA v. RICHARD CURTIS. { 1896. Aug. 14th. Aug. 21st.

Liquor licence—Sunday selling—Premises—Lodger—Act 28 of 1883, section 73—Act 25 of 1891, section 21.

C. *was charged with contravening section 73 (sub-section 7) of Act 28 of 1883 in selling liquor to* A. *on a certain Sunday, or otherwise with allowing* A. *to be in the bar of his licensed premises on Sunday.*

The defence was that A. *was a lodger, having that morning engaged a room to occupy temporarily during the stay of a friend at* A.'s *house.*

The Resident Magistrate found that A. *was not a lodger, and* C. *was convicted under section 21 of Act 25 of 1891.*

On appeal *the conviction was upheld.*

This was an appeal from the conviction of the accused before the Resident Magistrate of Cape Town on a charge of contravening the provisions of the Liquor Act of 1883 by permitting a person to be in his bar at a time when it should have been closed.

Mr. Searle, Q.C., appeared for the appellant; Mr. Sheil (Assistant Law Adviser) for the Crown.

The accused was charged before the Resident Magistrate with the crime of contravening section 73, sub-section 7, of Act 28 of 1883 as amended by Act 44 of 1885 and section 21, Act 25 of 1891, in that upon the 5th day of July, 1896, and at Cape Town in the said district, the said Richard Curtis did wrongfully and unlawfully keep his licensed premises open for the sale of liquor, or sell to one William Carman a quantity of intoxicating liquor known as beer, at a time he was not authorised by his licence to sell, viz., at 11.52 a.m. on Sunday, 5th July, 1896, or otherwise he did permit the said William Carman to be in the bar of his licensed premises as aforesaid at a time when the sale or disposal of liquor to the public is prohibited, viz., at 11.52 a.m. on Sunday, 5th July, 1896, the said Carman not being his agent, servant, or a lodger on his licensed premises.

The prisoner pleaded not guilty. The Resident Magistrate found him guilty of contravening section 21 of Act 25 of 1891, owing to Carman being found in the bar when he was not a lodger, and fined him 10s.

The following evidence was taken before the Resident Magistrate:

George Clark, Sub-Inspector, stated: On entering the bar from this room I found a man standing at the counter, on which was a glass placed before him, and it contained the remains of liquor, apparently beer. I asked the defendant who this man was; he said he was a lodger. I asked the man himself, "Are you a lodger?" and he replied he was. He gave his name as Carman. I then left the premises. Between five and ten minutes after this I saw the same man leave the premises and go up Church-street. The same evening I went to No. 40, New Church-street. I found the same man Carman there with his family, and found he was living

there with his wife and family. That is the same man and his wife. I saw him in court to-day.

William Carman, sworn, stated: I live at No. 40, New Church-street. I have a house there and have been living there about three months; on Sunday last I was in the Johannesburg Hotel bar, and the police came in at that time. I had ginger ale to drink, and after they left I went home to my house. I saw Mr. Curtis, the defendant, at the hotel on Sunday morning before I went into the bar. I asked him to give me board and lodging for a few days. He said "Yes." This to commence at once. I slept that Sunday night there. A member of my family came home that day and there was not sufficient room, and therefore I took lodgings at the hotel. I was there about a quarter of an hour before the police came. Before the police came, I had made arrangements with Mr. Curtis to give me board and lodging. No time was mentioned, I was to commence at once. I left the place immediately after the police left, and I went home. I am not sure; I don't think I did. I did not tell my wife that I was going to take lodgings at the hotel, and I made all the arrangements without the knowledge of my wife. After I went home I went back; but I am not sure whether I did or not. I don't know where I was; I believe I went back to Mr. Curtis. I can't say. I had my lunch at Mr. Curtis's hotel that Sunday at ten o'clock that evening. I had my dinner at home. I took my breakfast at home that Sunday. I had my dinner at two o'clock at home that Sunday, and lunch at ten o'clock that evening. I had no tea. I was not at home when my family had tea. They have tea at no particular time on Sundays. I could not say at what time I went to Curtis's that night, I stayed at Curtis's three days from Sunday. I am not sure that the lunch at ten o'clock on Sunday evening was the first meal I had at Curtis's. My room was shown me that Sunday evening about eleven o'clock. I have paid for the three days I stayed there. I slept there two nights. I was charged 10s. 6d., which I paid. My daughter arrived on Friday at my house. I slept at home on Friday and Saturday nights. I did not tell my wife when I left that I was going to the hotel. I forget whether I did tell her or not.

Mary Carman, sworn, stated: I am wife of last witness. I recollect on Sunday last my husband left home about ten o'clock. He had breakfast before he left; he had breakfast between eight and nine. He did not say where he was going to; he said he would find some place to sleep before he came home. Our daughter returned from a friend and there was no room for her. She returned on Friday afternoon. My husband slept at home on Friday and Saturday nights. He came home on Sunday, I can't say when. I saw him between four and five o'clock that evening. He went out in a passion that Sunday and said he would find some other place to sleep. I prepared no dinner on Sunday. He has not been taking any liquor to my knowledge for the last three or four weeks. We were rather cramped for room on our daughter's coming. I did not believe that morning when he left that he was going to take board and lodging at the hotel. He was annoyed that morning when he left because there was not sufficient room at home owing to my daughter's arrival. There was only one sleeping apartment, and my daughter slept with me.

Mr. Searle, Q.C.: The legal point is, can any one be convicted under section 21 of Act 25 of 1891, unless there is a *sale* of liquor? The effect of the evidence is that the person found on the premises in the bar was a lodger.

Mr. Justice Buchanan: The 21st section makes the fact of an unauthorised person being found on licensed premises during prohibited hours *prima facie* evidence of a sale.

Mr. Searle: But the Resident Magistrate didn't *find* there was a sale. *Queen* v. *Damm* (3 Juta, 63) is instructive as showing why different terms are used in this Act to what were used in the 1883 Act. The licence in this case authorises him to sell liquor but not on Sundays. In Damm's time under the Act of 1883, *bona fide* travellers could get liquor on Sunday. The Act 44 of 1885, section 1, prohibited selling liquor on Sunday—abolishing Sunday privileges. Section 21 of the Act of 1891 therefore is so worded to distinguish an offence under it from an offence under the old Act of 1883, because in 1891 there was actual prohibition of sale on Sundays. If the decision of the Resident Magistrate is right, any person who comes *on the premises* during the time when the sale of liquor was prohibited could lead to a conviction. Appellant was charged under a section which provides penalty for sale—*prima facie* evidence being the finding of a person in the bar. The Resident Magistrate does not find that there was a sale. The proper interpretation of the section is that the licensed victualler is liable for any persons found on premises, as to whom there is reasonable *prima facie* evidence of sale.

Mr. Justice Solomon: Why couldn't the Resident Magistrate convict (for a sale) under section 73, Act 28 of 1883, as amended by the Act of 1885?

Mr. Searle: But he wasn't charged with that nor did Resident Magistrate find it. In this case the defence was that Carman was a lodger. Now a lodger is a man who takes and pays for a room; he is a lodger if he has arranged this—even without having slept there or without taking his meals. See *Pyne* v. *Barnes* (L.R., 20 Q.B., 221), decided under English Act under section worded precisely like section 23. The evidence all went to show he was a lodger; all the Crown evidence proved it.

Mr. Sheil: The prosecution denies he was a lodger. Carman said he was a lodger because some of his family had returned that day, but his wife shows that the daughter had returned two days before. Carman's own evidence shows he is very dubious whether he was a lodger or not.

[The Court ordered the case to be sent back to the Magistrate to ask for his finding on the facts.

The Magistrate reported that his finding, as to Carman, was that he was not a lodger.]

The appeal was dismissed.

The Acting Chief Justice said: The 21st section of the Liquor Act of 1891, under which the appellant was convicted, is as follows: "If any person, other than the licence-holder, his agent, or servant, or a person lodging in the licensed house, be found in any bar on the premises of the holder of a retail licence during the hours in which the sale or disposal of liquor to the public is prohibited, it shall be taken to be *prima-facie* evidence of a sale of liquor during such hours. The licence-holder on whose premises any such person is found during such hours shall be liable to a penalty of not more than £5; but nothing in this section contained shall apply in the case of persons passing through any bar in any licensed premises for the sole purpose of obtaining access to an other part of such premises." For the appellant it is in the first place contended that there ought to be no conviction unless a sale of liquor has taken place, for that unless this be so any license-holder would be liable to punishment should any one come, however innocently, upon any part of the premises during prohibited hours. I cannot concur in this construction of section. The section is divisible into two distinct parts, the first relating to a matter of evidence in charges of illegal sales of liquor, and the second part imposing a penalty on the licensed dealer on whose premises persons are found during prohibited hours. If liquor is improperly sold the offender is punishable under other provisions of the Liquor Acts, and all the first part of this section provides is, what shall be taken as *prim -facie* evidence of such a sale. This is a presumption which may be rebutted. In this case the Carmen was found in the bar on appellant's premises between eleven and twelve o'clock on a Sunday morning with a glass before him which had contained some liquor which the police said looked like beer, but which Carmen deposed was gingerale. The Magistrate seems to have accepted the statement that the drink sold was not a spirituous liquor, for he did not act on the presumptive evidence of sale mentioned in the first part of the section, but only convicted accused of contravening the latter part of the section, and sentenced him to pay a fine of 10s. Now a person innocently on any part of the premises would not render the license-holder liable to punishment, for, reading the whole section together I think it was the intention of the Legislature that a person must be found in the bar, and not merely on any other part of the licensed premises. This view is supported by the proviso at the end of the section to the effect that it is only if any person not excepted by the section is found in, and not merely passing through, the bar of a licensed house during prohibited hours, that the section has been contravened. The second ground of appeal is that Carmen was a lodger. This is a question of fact. In support of this allegation the only witness called was Carmen himself. The appellant gave no evidence. It was shown that Carmen had a house in town, where he resided with his wife and family. He, however, stated that as he was pressed for room owing to the arrival from the country on the previous Friday of his daughter he had gone to the hotel to bespeak a room for Sunday night. Carmen left the hotel immediately after the police and went home to have his meals there, but he says he returned to the hotel at ten o'clock that night and slept there. The discrepancies between the statements of Carmen and his wife, as well as between different parts of Carmen's own evidence, however, rendered the evidence so unsatisfactory that the Magistrate was asked to state his finding on the facts. He now reports that Carmen's evidence was thoroughly unreliable in every respect, and that he was not satisfied that Carmen slept at the hotel that Sunday night. It is not necessary to go so far as to hold that the onus in the first instance is on the accused to prove that Carmen was actually a lodger, but enough was shown to establish a *prima facie* case that he was not, and this case has not been rebutted, although the matter was peculiarly within the cognisance of the defendant. Under these circumstances we are not prepared to disturb the Magistrate's finding. On both grounds, therefore, the appeal must be dismissed, and the conviction confirmed.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon The Resident Magistrate having in this case found as a fact that the man Carman was not a lodger, and did not sleep on the premises that night, I feel no difficulty in deciding that the appeal should be dismissed. There is, no doubt, some force in Mr. Searle's contention that there is some difficulty in construing the latter portion of section 21 of Act 25 of 1891. For if the word "premises" be given its full meaning, the effect of the clause would be that a licence-holder would be guilty of a contravention of the section in circumstances which never could have been intended by the Legislature. For instance if, any person paid him a friendly visit, or if any one came to see him on business, during the hours in which the sale of liquor to the public is prohibited, and if such person were found on the premises, the licence-holder would be liable to a penalty of £5. This never could have been intended by the Act, and it seems to me that the reasonable and proper way of getting over the difficulty is to limit the meaning of the word "premises" to the bar, or that portion of the premises where liquor is sold. That this was intended by the Legislature seems quite clear from the preceding portion of the clause as well as from the proviso at the end of the section, and if the whole section be read together, I am satisfied that it was intended that the word "premises" in the clause under consideration should bear the limited interpretation which I have put upon it. Mr. Searle, however, proposes to get over the difficulty by arguing that the penal clause should be taken to apply only in the case where the person found on the premises had been supplied with liquor, but to this reading there seems to me to be insuperable objections. In the first place if the licence-holder had sold liquor to the person found on the premises there would be no necessity for this penal clause, for he would be guilty of a contravention of sub-section 7, section 73, Act 28 of 1883, which provides a severer penalty than does the section under consideration. Mr. Searle attempted to draw a subtle distinction between the case of a person "being prohibited from selling liquor within certain hours" and of a person "who is not authorised by his licence to sell during any time, and he referred to the case of *Regina* v. *Damm* (3 J., 63), in support of his contention. That case, however, does not seem to me to justify such a distinction, and I can only say that it appears to me that when a person is prohibited from selling liquor during certain hours, it may with perfect propriety be said that he is not authorised to sell liquors during such hours, and that consequently sub-section 7 already referred to would apply to his case. Secondly, the construction contended for by Mr. Searle would necessitate our importing into the section most important words which could scarcely have been inadvertently omitted. If it was intended that the licence-holder should be guilty of an offence only in case the man found on the premises had been supplied with liquor, I am quite satisfied that this would have been made quite clear, and that the section would not have been left as it now stands. Thirdly, if Mr. Searle's contention were upheld, the proviso at the end of the section would be quite meaningless. For according to that contention where a person was found passing through the bar, the licence-holder would necessarily be innocent of any offence, unless he had supplied liquor to such person. What necessity was there then to say that the section should not apply in the case of persons passing through the bar "for the sole purpose of obtaining access to any other part of such premises." The addition of these words satisfies me that the licence-holder would be guilty if the person were found in the bar for any other purpose than that specified in the proviso. I am therefore of opinion that the construction contended for on behalf of the appellant cannot be adopted, and that the proper and reasonable construction of the section is the one which the Court has now placed upon it.

[Appellant's attorney, J. Ayliff.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice). Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

JOSEPH V. CALITZ. } 1896.
JOSEPH V. POTGIETER. } Aug. 17th.

Provisional sentence — Consideration — Promissory Notes—Signing while intoxicated—Criminal charge—Principal case—Onus of initiation—Lease Registration.

J. *sued* C. *and* P., *on sundry promissory notes.*

The defendants alleged in their affidavits that there was no consideration for some at least of the notes; and though the signatures were not denied it was alleged that

plaintiff was in the habit of giving strong drink to the defendants and obtaining signatures to documents from them while in a state of intoxication.

P., *however, had practically admitted the indebtedness in certain letters that passed between his legal adviser and plaintiff and had allowed provisional sentence in favour of* J. *to go by default in regard to four previous promissory notes for £282 in all, though he now denied that including these notes and the notes now sued on he owed more than a total of £100 on all his transactions with plaintiff.*

The Court *gave provisional sentence as against* P., *but refused it against* C. *(Solomon* J., *diss.) on the ground that serious criminal charges were made in his affidavit by* C. *against plaintiff, on which witnesses should be heard, and ordered the plaintiff to go into the principal case.*

J. *also applied on motion for an interdict restraining the mortgaging of certain land by* C. *until a lease alleged to exist had been registered against it.*

The Court *declined to grant the interdict but ordered this to be gone into in an action to be consolidated with the principal case on the promissory notes.*

There were three applications heard together.

(1) Joseph v. Potgieter: For provisional sentence on promissory rule for £265 dated March 11, 1896, in favour of the plaintiff Chiam Joseph.

Mr. J. Rose-Innes, Q.C. (with whom was Mr. Close) for the plaintiffs. Mr. Schreiner, Q.C., for the defendant.

(2) Joseph v. Calitz: Application for provisional sentence on three promissory notes for £380, £100 and £16 in favour of plaintiff, and one for £28 drawn in favour of M. Joseph & Co., and by them endorsed.

Mr. Rose-Innes, Q.C. (with whom was Mr. Close) for the plaintiffs. Mr. Schreiner, Q.C., for the defendant.

(3) Joseph v. Calitz: Mr. J. Rose-Innes, Q.C., applied for an order restraining the respondent from mortgaging certain portions of the farms Buffelsjachtsfontein and Water Kloof, in the district of Oudtshoorn, registered in the name of his wife, to whom he is married in community of property, until the lease granted to applicant in respect thereof has been duly registered against the property,

Mr. Schreiner, Q.C., appeared for the respondent.

The defence in both the provisional cases was that there was no consideration, though the defendant Potgieter tendered to pay whatever amounts might on an account be shown to be due to the plaintiffs.

By consent, as the facts in the two matters of Joseph v. Calitz were very much the same, and as the defences in Joseph v. Calitz and Joseph v. Potgieter were similar and the facts in the applications were involved together, the three matters were taken together.

I. Joseph v. Potgieter: In this case the defendant made affidavit as follows:

1. That deponent has been sued by plaintiff, a Jew, for the sum of £265. on a promissory note bearing date the 11th March, 1896, and due 25th July, 1896.

2. That during last month deponent was also sued by plaintiff on four separate promissory notes amounting to £282 12s. 6d., for which sum provisional sentence was obtained on or about the 13th July last, deponent having, in ignorance, allowed same to go by default—copy said summons hereunto annexed marked A.

3. That the sum claimed on these two summonses amount to over £547 sterling.

4. That the only transactions deponent had with plaintiff during the last twelve months are:

"A bill in favour of A. Hotz for the sum of £45 which plaintiff undertook to settle for deponent, and sundry small advances, in all about £40 or £50 sterling, and in the month of March last, deponent applied to plaintiff for a loan of £20, when plaintiff got him to sign a bill, as he (deponent) understood for the £20. Plaintiff gave him only £17, stating it was all he had, and that he would give the balance £3 at another time but has since given him only £2 sterling, which is the only money or consideration received by deponent from plaintiff since March last, notwithstanding plaintiff holds a bill dated 16th April last for £115 15s. sterling, as appears on copy summons referred to in paragraph 2.

5. That with the exception of the £17 and the £2 referred to in the preceding paragraph, deponent received no consideration for the promissory note signed in March last now sued on, and which deponent must have signed under the belief that it was for the £20 then applied for.

6. Plaintiff has on several occasions induced deponent to sign bills after treating him to strong drink.

7. Deponent swears positively that including the bill to A. Hotz of £45 he is not indebted to plaintiff more than about £100, and hereby tenders payment of any amount due and owing by him to plaintiff on a correct statement of account.

The answering affidavit of plaintiff was as follows:

1. That I have had read to me the affidavit of the defendant sworn to on the 30th July, 1896.

2. I deny paragraphs 4, 5, 6 and 7 thereof.

3. The defendant is indebted to me *inter alia* in the sum of £556 for value received, made up as follows: Overdue promissory notes on which provisional sentence has been given in my favour on £282 12s. 6d., amount of promissory note on which defendant is being sued £265. Promissory note my favour dated 13th January due 31st July, 1896, £7 5s., costs paid by me to Cairncross & Co., in *re Hotz* v. *Defendant* £1 2s. 6d.—£556.

2. The defendant through his attorney and auctioneer J. H. Swemmer advertised in the local newspaper of the 23rd April last, for sale on the 23th April following by public auction, certain fourth share in lots 5, 7, 9, 10 and 16 of the farm Langverwacht. The defendant to pay me out of the proceeds of this sale, but as a sufficient offer was not made on that day, the property was declared unsold (a copy of the advertisement is annexed marked "A.")

3. After the sale by auction the defendant offered me the property for £700. I concluded the sale with the defendant and we fixed for the 11th of May last to be in Oudtshoorn, to have the deed of sale drawn. The deed of sale was drawn up and signed on that date, the defendant allowing the £556 he was indebted to me to go in payment of the purchase amount as set forth in the deed of sale.

4. About the middle of the month of June last Mr. Cairncross told me that Mr. Swemmer had told him that the defendant was not possessed of any landed property in his own right. That the land in question was the property of his father, who intended giving the same to his son as a free gift, but that he probably would not now do so. That he (Swemmer) had instructions from the father to sell the land, that the advertisement of the sale will soon appear in the newspaper, and that the proceeds of the sale would be handed to the defendant, to do with it as he pleases. That he (Cairncross) thought this was done to evade the payment of the amount due to me, and he also told me that the property sold by the defendant to me was not the same as that which was to be again put up to auction.

5. I was then advised, as the defendant was not entitled to the property, and therefore could not sell it, and as he could not expect to receive transfer thereof, to declare the sale cancelled. On my proposing this to the defendant he agreed. The arrangement we arrived at was that the sale was to be considered as cancelled and that he remained indebted to me on the promissory notes. Mr. Swemmer thereafter would not agree to pay the amount due to me out of the proceeds of the sale, and I summoned the defendant on the amount of the then overdue promissory notes, £282 12s. 10d., and obtained provisional sentence. In the promissory note for £265 I likewise caused summons to be issued.

6. After the summons was issued Mr. Swemmer offered me transfer in terms of my deed of sale (Koopbrief). I was advised to accept and I agreed. As it however appeared that the property which was offered for sale, and of which they intended giving me transfer, was not the same which I purchased in terms of the advertisement, I declined to accept it and allowed the action to proceed.

7. I was thereafter again offered the property as offered on the day of sale by auction for £50 less than what I gave, that is, a different share in the farm to what I purchased for £650. Of this amount the £556 was to be deducted and the balance was to be paid by me on the passing of transfer. This offer I also declined.

8. Subsequent to this Mr. Swemmer again offered the same property to me for £600. Mr. Cairncross told me that he thought Mr. J. du Toit would be a likely person to give this price for the property as it adjoins his, and he advised me to see Mr. Du Toit. The latter and I met at Mr. Cairncross's office, when he stated that he would take the property for £600 subject to his terms of payment. I agreed to this conditionally. I saw Mr. Swemmer and told him that Mr. Du Toit would give £600 for the property. He then told me that I was too late as the property had been sold.

9. At no time did Mr. Swemmer either by correspondence or verbally deny the debt. The first intimation I received that the debt was denied, was when the defendant's affidavit was read over to me.

10. Previous to the statements made by me in paragraph 8, the said Swemmer offered me in Mr Swemmer's office one-fourth of the pasturage, and the arable land of lot 7 of Langverwacht, for the amount owing to me by the defendant,

provided I pay all the expenses, adding that it was a bargain. Mr. Cairncross advised me not to accept the offer.

11. I also annex a copy of the "Koopbrief" dated the 11th May, 1896, and a translation marked B. and C.

II. Joseph v. Calitz: In the claim for provisional sentence the following was the defendant's affidavit:

1. That he (defendant) has been summoned by plaintiff, a Jew, for the sum of £524 2s. sterling, on certain four overdue promissory notes, bearing date 16th December, 1895; 9th March, 11th March and 25th June, 1896, respectively.

2. That deponent has received no consideration in respect of the said promissory notes.

3. That plaintiff has known defendant for over ten years and has on several occasions procured deponent's signature, after treating him (deponent) to strong drink.

4. That deponent's estate was some five years ago surrendered as insolvent, since which time he has been in very straitened circumstances, often having to procure food for his family from his parents in law.

5. That in the month of April, 1895, deponent's father in-law gave deponent possession of a portion of land (bequeathed to deponent's children), on a contract of lease for one year.

6. That on the same day plaintiff induced deponent to sublet to him in writing portion of the said land for a period of five years at £40 sterling per annum, paying the rent for the first year in cash.

7. That shortly thereafter plaintiff came to deponent's residence and asked for the duplicate contract of lease held by deponent, stating that it was not written properly, and that it had to be written by an agent. I gave him the contract which he took away. When I went into Oudtshoorn again, after off-saddling at his (plaintiff's) place according to custom, he told me he had a contract written. I must come and sign it. He took me to an attorney's office, where a contract was read over to me. I remarked that it was wrong, that it must be for five years, and that it must be for only £40, sterling the first year's rent had been paid. Plaintiff pulled at my sleeve, said, "Never mind, it will be all right between us," and I signed copy contract annexed marked A.

8. That in or about August or September, 1895, as I barely had food during severe drought, my father-in-law gave me transfer of a certain other piece of land, which I sold for £330 cash on transfer; that before receipt of the money plaintiff handed a claim in against me for some £138 7s. 6d., which was settled, notwithstanding it included two bills of £60 10s. and £65 respectively, of the consideration for which I had no knowledge.

9. That from settlement of said claim in September last to May, when plaintiff agreed to advance deponent £30 to purchase a certain wagon, deponent had no business transaction with him (plaintiff).

10. That for said advances plaintiff took a bill at three months, in which said wagon was pledged as security. That wagon was barely three weeks in my possession when plaintiff came to my place, bringing half a gallon of brandy with him. After sundry friendly drinks he threatened me with criminal proceedings for having the wagon out, told me he must have it in his possession for fourteen days to make the pledge valid, and took it away. He has not yet returned it. The purchase amount of the wagon was £65. I still owe the builder the balance, £35.

11. That early in June last my father-in-law signed for transfer of certain land to my wife, to whom I am married in community of property, after which I procured from plaintiff: 1896, June, cash £5; June, seed, oats and barley, £9 10s.; 6th July, cash £20—£34 10s., on which date plaintiff got me to sign a blank bill to cover above items.

In answer to the above the plaintiff made affidavit:

1. That I have had read over to me the affidavit of the defendant sworn to on the 27th July, 1896.

2. I admit that I am of the Hebrew persuasion, and that the defendant has been summoned by me for the sum of £524 2s. as stated.

3. With reference to paragraph 2 of the defendant's affidavit, I say that the defendant did receive full value for the amount of his indebtedness to me. That although I several times made personal demands on him for payment, he at no time previous to the filing of his affidavit raised the question that he had received no consideration, and I repeat that the defendant did receive full consideration and value for the bills which he passed in my favour.

4. I admit that I have been acquainted with the defendant for a considerable number of years, but I most emphatically deny that I have ever treated him to strong drink for the purpose of obtaining his signature as alleged, or that I transacted any business with him while in a state of inebriation. The defendant's signature to the several bills and documents will show whether or not he was inebriated when he signed them.

5. The defendant is somewhat confused in his statement made in paragraph 5 having

reference to a bequest of certain landed property to his children from his father-in-law, as both his father-in-law and mother-in-law are still alive. The gift in question was a free gift to the defendant's wife, to whom he is married in community of property, in order to raise a loan and pay the defendant's debts out of the proceeds. That transfer was passed in favour of the defendant's wife as stated in paragraph 11 of his affidavit, and the defendant's local attorney is now raising a loan on the property transferred to the defendant's wife.

6. I have no knowledge of the allegations contained in paragraph 5 of the defendant's affidavit.

7. I admit that a previous lease was drawn up between us by a schoolmaster, but the terms thereof were subsequently altered. I told the defendant that the new lease was to be properly drawn by one or other of the attorneys in Oudtshoorn. The defendant is in error in saying that I had a contract ready drawn for his signature. The defendant gave the particulars to the attorney who drew the contract, and we were told to call in again after a while to sign it when it was completed, which we did, after it was read over and explained to us. No mention was at the time made of the previous lease or that the contract was to be for a term of five years only, or anything about a payment of £40. After the lease was drawn and signed it was handed to defendant, together with a duplicate, in order to get his father-in-law's consent to the lease, as the property was then registered in the name of the latter. The defendant kept both copies in his possession for six days and thereafter returned the original to me with his father's consent endorsed thereon and he retained the other copy.

8. I am at a loss to understand the meaning of the statement made by defendant in paragraph 8 of his affidavit, and I do not know what bearing it has on this case.

9. I admit that a settlement was arrived at between the defendant and myself in September last, but I do not understand the reference made by him of "September last to May." The amounts sued upon are debts contracted since we had the settlement in September last.

10. The statement made by the defendant in paragraphs 9 and 10 of his affidavit having reference to the transaction arose as follows: The defendant purchased a wagon from one George Green, a wagonmaker, for £65. Before delivering the wagon Green wanted a certain amount to be paid on account. I advanced the defendant £30, on the payment of 20s. for commission advancing, thus leaving a balance of £35 in favour of Green, which amount Green informed me the defendant subsequently paid.

11. The defendant's indebtedness to me arose as follows:—

Promissory note dated 16th December, 1895, was a bill the defendant was indebted to M. Joseph & Co., and taken over by me at defendant's request...				28	0	0
Promissory note dated 9th March, 1896, overdue bill	280	0	0			
Amount paid Green £230, commission £1 ...	31	0	0			
Cash	54	0	0			
Discount	15	0	0			
				380	0	0
Promissory note dated 11th March, 1896, cash £15 7s., discount 15s.				16	2	0
Promissory note dated June 25. It was arranged between the defendant and myself that he was to raise a loan, and pay me out of the proceeds. He was at the time about to start on a journey to Mossel Bay, and said that he would return about the 23rd of the month. That I was to have the power to raise loan in the meantime drawn up, and that I was to come out to his farm and bring with me £100 cash, when he would sign the power to raise loan. I had the power and also the promissory note drawn before I left the village. As I was told that the power had to be signed in the presence of a J.P., and attested by him, I informed the defendant of this, and we went together to Calitzdorp (his residence being near that place) and he declared to his signature and the contents of the power before the Special J.P. of Calitzdorp. I thereafter paid the defendant the £100, deducting £1, amount due to me for seed, oats and barley, and paid him in actual cash £90				100	0	0
				£524	2	0

12. On the 6th July the defendant asked me to advance him an additional £50, to be repaid out of the loan about to be raised, which I did.

13. The reason why I made the defendant the above advances, was because I also own certain shares in the farm, and I was anxious to secure his land by purchase. As I found later on that

he wanted too high a price and having a long lease on the property, it was agreed that the defendant should raise a loan and refund the amount which I advanced him, after which the lease in my favour was to be registered against his deed of transfer.

14. After signing the power to raise the loan and my making the advances on the strength of the loan to be raised, the defendant revoked the power by giving another one of a later date in favour of his local attorney, Mr. J. H. Swemmer. I then for the first time became aware that the defendant was indebted to Mr. Swemmer in the sum of £799, which information I received from Mr. Swemmer himself.

15. I have therefore every reason to believe that the defendant's intention was to get as much money out of me as he possibly could and then secure his local attorney for the amount of his indebtedness to him, and as I did not consider the defendant's estate as wholly solvent after I became aware of his indebtedness to Swemmer, I caused summons to be issued to prevent the latter obtaining a preference over me.

16. Before I commenced advancing the defendant money I inquired of him whether he owed any person money. He informed me that he was in no one's debt.

17. I also went to the shop of one Reuben Bresky, who lived near to the defendant, and inquired of him whether defendant was in his debt. He replied that he would not give him credit. I thereupon made the advances to defendant.

18. I had several conversations with Mr. Swemmer in respect of defendant's indebtedness to him, but as he told me each time that a different amount was owing to him by the defendant I was advised to go to the defendant himself and inquire of him what amount he owed Bresky or Swemmer. Acting upon this advice I went to the defendant's residence but found him away from home. I however saw his wife, and she told me on my inquiring about her husband's transactions with Bresky and Swemmer, that the former took the promissory notes from Calitz in order to get me away from the ground which I held under lease and that he got no consideration from them.

19. I have every reason to believe that the said Bresky and Swemmer gave no valuable consideration, or at least a very small amount, for the £799 which Swemmer, the local attorney of the defendant and the J.P., before whom the affidavit was sworn, alleged as owing to him, and that by a person who is always in a state of inebriation or who is apt to be led away by liquor as the defendant states in his affidavit.

20. I am under the impression and also verily believe that the affidavit filed by the defendant was done with no other intent or object but that of obtaining time in order to get the loan through before I could obtain judgment in my favour. My reason for saying so is because the defendant's affidavit was not served locally as is customary, but on my Cape Town attorneys, and was thereafter forwarded to my local attorney for my reply, which has entailed considerable and unnecessary delay.

III. Joseph v. Calitz: In this case on the lease there were lengthy affidavits, which showed that respondent contemplated mortgaging certain property over which applicant urged that a lease existed, but there was great conflict as to the period for which the lease was to exist and as to the extent of ground affected by it.

Mr. Schreiner: In September last it is common cause that a settlement was made. This effected a novation of all previous transactions between the parties. From the facts shown all the probabilities are in favour of the defendant's statements that they received no proper consideration for the notes.

Mr. Innes: The facts disclosed on the affidavits shew that there was ample consideration for the notes. The defence of novation is not raised on the record by the defendants. There is only an insinuation and no direct defence that the signatures of the notes were obtained while defendants were in a state of intoxication. They have quite failed to substantiate this. On the question of the interdict *Dreyer* v. *Luttley* (3 Juta 59) shows the course which should be followed where the mortgage is before the lease. Here the lease is indeed before the mortgage, but even then the lessee, if the law requires or allows registration of a lease, should not lie by and allow later registration of mortgages.

A lease gives no *jus in re* such as a servitude, but if it goes for number of years it confers a somewhat similar kind of right. As to the necessity of registration the old authorities differ greatly as *e.g. Grotius* (3, 19, 9, *Schorers, note* thereon); *Sande, Restraints on Alienation* (1, 8, 45); *Voet* (19, 2, 1). Matter first came up in our Courts in *Maynard* v. *Usher* (2 Menz., 170); also see *Green* v. *Griffiths* (4 J., 349). Suppose this was a *bona-fide*, duly constituted lease what prejudice can respondent suffer from this registration? Even if our Court does not require it yet it allows registration.

The Acting Chief Justice said: In both cases the defence has been raised of want of consideration for the notes sued upon. In Calitz's case serious allegations have been made, which

ought to be further irrestigated. Witnesses must be heard before any decision can be come to thereon, and if these allegations are proved, defendant will be entitled to succeed as far at any rate as to the larger amounts claimed. I do not think the defendant has, in his answering affidavit, given such full information as he ought to have done, but as in my opinion the plaintiff should go into the principal case, it is as well not to discuss the affidavits further. At the present stage provisional sentence will be refused. In Potgieter's case, however, provisional sentence will be granted with costs, for besides the explanations given by the plaintiff we have the correspondence which has taken place between the attorneys on both sides. Defendant has also previously allowed judgment to be given against him for part of his debt to plaintiff, and has satisfied that judgment, all which goes to negative his defence of want of consideration. The defendant's legal advisers have virtually admitted the claim now set up, and made offers of settlement. Under these circumstances of the defendant wishes to go into the principal case, the onus is upon him. As to the interdict, no order will be made. The term of the lease has been questioned, and the extent of land leased is also in dispute. The question of costs will stand over pending action, but if no further proceedings are taken, respondent in this application will have his costs.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon dissented from the rest of the Court in the claim for provisional sentence in the case of Joseph v. Calitz. He agreed that the case was one in which it was most desirable that the principal case should be heard, but he thought that the onus of going into the principal case should be cast upon the defendant, and not upon the plaintiff. The case was one in which the defendant's signatures to the promissory notes were admitted, and the defence relied upon was substantially this, that the plaintiff had taken advantage of the defendant when he was in a state of intoxication to procure his signature to these notes, that he had no knowledge of the signing of the notes, and that he had received no consideration in respect thereof. This defence clearly charges the plaintiff with a most serious criminal offence, and in accordance with the ordinary rules regarding criminal charges a very strong case should be made out by the defendant. Now the ordinary practice of the Court in defended provisional cases was to refuse provisional sentence where it seemed reasonably probable that the defendant would succeed in the principal case. In the present case, upon the evidence set forth in the defendant's affidavits, there appeared to be no reasonable probability that this serious charge brought by him against the plaintiff would be substantiated in the principal case. The charge rested mainly upon the defendant's own affidavit, and was not in any way supported by the appearance of the documents themselves. The promissory notes were three in number, and all of them admittedly bear the defendant's ordinary signature, though as the allegation is that they were obtained when he was in such a state of intoxication that he did not know what he was doing, one might naturally expect that the signatures would differ somewhat from his usual signature. The defendant's counsel, however, relied strongly upon the circumstances of the case as corroborating the defendant's affidavit. It was urged that there was nothing to show for this large sum of money appearing on the face of the notes to have been received by the defendant, that the defendant was at present in impecunious circumstances, and that it was most improbable that he could have spent so much money in so short a time. On the other hand, however, there is the fact that the defendant apart from these notes altogether is indebted to Mr. Swemmer in the sum of about £800, so that he apparently is somewhat lavish in his expenditure, and consequently might have easily disposed of this money in a short space of time. Further reliance was placed upon the fact that the plaintiff's answering affidavit does not sufficiently disclose what was the consideration given for these notes. But with the exception of one item of £200 alleged to be for the renewal of a previous note, the information supplied by him seems to be sufficiently explicit, and bearing in mind the fact that it is the defendant who has to establish the want of consideration, it seems to be going rather far to hold that this omission to supply further information regarding the amount of £200 is in itself such strong corroboration of the defendant's case as to justify the Court in refusing provisional sentence. The plaintiff is supported in very material points in which there is a conflict of evidence between himself and the defendant by the affidavits of two attorneys of the Court, and on the whole without going at too much detail into the evidence, the probability of defendant's success in the principal case seems so doubtful that he could not be held to have discharged the onus cast upon him, and consequently provisional sentence ought to be granted.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

TERBLANCHE V. OUDTSHOORN MUNICIPALITY. } 1896. Aug. 18th.

Appeal—Jurisdiction—Summons—Mistake—Wrong party—Withdrawal—Witness expenses—Costs—Procedure.

A summons was served upon T. *by mistake owing to a similarity of names, but* T., *who knew for whom it was meant, took no steps to secure the right person getting it.*

T. *came from the country, (bringing his child to be christened) and attended at the Resident Magistrate's Court in consequence of the summons. The summons however had been withdrawn before the case came into court.*

T.'s *attorney afterwards applied for witness expenses, which the Resident Magistrate refused on the ground that there was a want of* bona-fides *by* T. *in his action in the matter, and that he had come into town to get his child christened and had taken advantage of the mistake.*

Held on appeal *that the application to the Magistrate was irregular, and that there was nothing before the Supreme Court on which it could adjudicate.*

This was an appeal from the decision of the Resident Magistrate of Oudtshoorn.

Mr. Graham appeared for the appellant; Mr. Schreiner. Q.C., for respondent.

The following was the Magistrate's statement of facts proved, together with the reasons for judgment pronounced by him:

That defendant, Petrus Jacobus Terblanche, received from the attorney to the Town Council James A. Foster, a demand for rates due to the Council on certain erf in the township of Oudtshoorn.

I find that defendant is not the Petrus Jacobus Terblanche owning the erf.

That upon receipt of the demand he came into Oudtshoorn and explained to the attorney that he was not the Petrus Jacobus Terblanche who owned the erf, but that he knew who the right Petrus Jacobus Terblanche was and undertook to send the demand, and did send the demand to the right Petrus Jacobus Terblanche.

That he was thereafter summoned for payment of the rates due.

That upon the summons being served upon him he expressed his surprise at being summoned, as he had been to Mr. Foster on receipt of demand and told him he was not the man.

That though the deputy messenger spent the night at his house he did not inform him that he had undertaken to send the demand, and actually had sent the demand to the right man.

That he came into town on the Saturday before the Monday on which he was cited to appear and brought in his child to be christened, and had the child christened, attended the court on Monday morning, by Attorney Smith and found that the case had been withdrawn.

Mr. Smith applied for defendant's witness expenses, and the consideration of the question was postponed until the following Monday, 6th July.

Under the circumstances I consider that Petrus Jacobus Terblanche was entitled to his expenses for coming in, but that there was a doubt as to his action being *bona fide.*

As stated, the matter was gone into on Monday 6th July. From the way he answered the questions in cross-examination I was satisfied that his action was not *bona-fide*, and that he came into town to have his child christened and took advantage of a mistake of which he was perfectly well aware—a mistake pardonable in this district where there are so many men of the same christian and surname—a mistake on the part of the Council's attorney,—and claimed witness expenses.

It should be stated that the right Petrus Jacobus Terblanche came in on the very Monday and paid the rates and costs of the summons, though according to the defendant he (the defendant) did not inform the right P. J. Terblanche that he had been summoned, and the right P. J. Terblanche could not possibly have known about the matter unless he had been told. For these reasons I refused the application for defendant's expenses,

Mr. Graham: The facts speak for themselves. The appellant is clearly entitled to his costs.

Mr. Schreiner: The matter of legal importance in this case is as to whether there is jurisdiction. The only case which was before the Resident Magistrate and under his jurisdiction was withdrawn. The Resident Magistrate went on into matters in which he had no jurisdiction unless the parties gave it him, which they could not give him as Resident Magistrate. *Divisional Council, Riversdale* v. *Pienaar* (3 Juta, 252). His jurisdiction if any was only that of an arbitrator and from that there is no appeal. The defendant ought to take out his summons for his costs. There was nothing before the Court to adjudicate when the parties came in.

There is a clear distinction between witnesses' expenses and costs. Act 20 of 1856, section 2', *Hepworth* v. *Dunkley* (3 Juta, 400). If a case has been withdrawn at any time before case comes on there is no jurisdiction under the existing rules or Resident Magistrate's Court Act; even if there had been there would be no appealable matter. At the least the Court won't interfere with the judicial discretion of the Court. *Kirsten* v. *Van Noorden* Buchanan, 1879, p. 232); *Van den Berg* v. *Gebhard* (3 Menz., 407).

The appeal was dismissed with costs.

Acting Chief Justice: In this case the appellant was summoned to pay a certain amount for rates due to the Oudtshoorn Municipality. Before the case came on the summons was withdrawn and the proceedings were thus terminated. No case was called, and no judgment was given. Under ordinary circumstances when a plaintiff withdraws a case he would have to pay the defendant his costs. If the plaintiff refused to pay these costs I think the only course open to the defendant is to take out a summons, claiming them, and then the Magistrate could give a judgment. In this case nothing of the sort was done; but the attorney for the defendant irregularly applied for an order for his costs. This the Magistrate declined to give. I regret we cannot now give any decision on the merits of the case. The appellant appears to have been very hardly used. But there were no judicial proceedings, and therefore no ground for the case to be brought on appeal to this Court. The Court must dismiss the appeal simply because there is no matter before the Court, nothing upon which it can adjudicate. The appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

THERON V. TIFFIN. } 1896. } Aug. 18th.

Jurisdiction—Resident Magistrate—Counter-claim—*Bona-fides*—Merits of case.

A. *was sued by* B. *for £39 19s. 8d., balance of an account for goods sold.* A. *excepted to the jurisdiction of the Resident Magistrate, in that he had a counter-claim of £51 1s. 9d., commission fees due.*

The Resident Magistrate, to satisfy himself as to the bona-fides *of the counter-claim, took evidence and called the defendant. But the Resident Magistrate not being satisfied then, interrogatories were administered to the plaintiff. No objections were raised by defendant till the receipt of the answers, when he objected to their being read. Finally, the Resident Magistrate after reading the answers overruled the exception.*

Held on appeal *that the Resident Magistrate must confine himself to the question of* bona-fides *of the defendant's claim in reconvention, and that as in this case he had not done so the appeal must be upheld.*

This was an appeal from the Assistant Resident Magistrate of Aliwal North, in an action in which the appellant was sued for £233 19s. 8d., less £194 paid on account, for goods sold and delivered. Exception was taken on the ground of want of jurisdiction—there being a counter-claim of £51, being 5 per cent. commission agreed to be allowed by plaintiff to defendant on all purchases of building material made by defendant from plaintiff, which purchases amounted it was alleged to £1,021 16s. 6d. Thereupon the Assistant Resident Magistrate examined the appellant with a view to ascertaining whether he had a *bona-fide* counter-claim, and also examined the plaintiff, and went into the merits of the matter. The Assistant Resident Magistrate decided that the counter-claim was not *bona-fide*. Against this decision the appeal was now made.

Mr. Schreiner, Q.C., appeared for the appellant; Mr. Graham for the respondent.

Before the Acting Resident Magistrate,

Hendrick Gerhardns Theron stated: I am a builder and contractor. In the month of October, 1894, I had transactions with Tiffin, of Queen's Town. At that time I had certain building contracts on hand; the amount of the contracts was over £3,000. I was introduced to plaintiff for the purpose of purchasing my articles there. It was arranged that I

should get all my building material from plaintiffs, he allowing me 5 per cent.; this was to be paid when all material had been bought and my contracts were finished. There have been further accounts from Tiffin in addition to that now sued upon amounting to £827 16s. 6d. The total amount paid to Tiffin under my agreement amounts to £1,021 16s. 6d. The payments made to Tiffin by M. Hall on behalf of Mr. Schweizer are for accounts subsequent to the account now sued upon. All my contracts under this agreement have now been completed. Plaintiff has not allowed me the 5 per cent. commission as agreed. I dealt permanently with plaintiff.

The following were the Magistrate's reasons:

In this case plaintiff sues defendant for the sum of £39 19s. 8d., being balance of account for goods sold and delivered.

Defendant does not deny that a balance is due by him, but excepts to the jurisdiction of this Court inasmuch as he has a counterclaim of £51 1s. 9d., being 5 per cent. commission agreed to be allowed by plaintiff to defendant on all purchases made by him (defendant) from plaintiff, which purchases amounted to £1,021 16s. 6d. In order to satisfy myself that the claim made by defendant was a *bona-fide* one, I proceeded to take evidence on the point. Defendant was called, and stated that plaintiff had agreed to allow him 5 per cent. commission on all purchases; this agreement he stated was further mentioned at Molteno at a meeting between plaintiff and defendant, and defendant's agent, Hall. This being a question of fact, which might be corroborated by the evidence of Hall, I was not prepared to accept the evidence of defendant alone. Interrogatories were accordingly administered to plaintiff. No objection was raised by defendant's agent, the interrogatories being confined purely to the question as to whether the agreement as to commission existed. This was accordingly done. On receipt of answers to the interrogatories (Tiffin v. Hall) defendant's attorney objected to evidence of Tiffin being read, submitting that this was not necessary and should not have been taken, quoting in support case of *Brady* v. *Michiel* (3 Juta, p. 178) and *Brett* v. *Soliman* (4 Juta, p. 6). This objection I overruled, holding that no objection was made by defendant's attorney for evidence of plaintiff (which was the proper time for raising such objection); further that I was bound to take sufficient evidence to satisfy myself as to the claim being a *bona-fide* one. The case of *Brady* v. *Michiel* certainly lays down the rule that it is not neccessary to take the evidence of plaintiff, but this I held was in cases where the magistrate was satisfied with the evidence of defendant alone. In this instance I was not satisfied with the evidence of defendant (Theron) alone. His evidence is not corroborated by Hall, who acted all through as his agent, specially appointed in transactions with Tiffin, discharged all Theron's accounts, and therefore in my opinion would have be cognisant of any claim on Tiffin for commission claimed by defendant (Theron). Theron states that Hall was present at a meeting at Molteno, when Tiffin spoke of commission. Hall does not admit this and says that he knows nothing of the commission mentioned beyond what Theron told him, namely, that Tiffin had promised him commission. Hall makes no allusion whatever to this meeting at Molteno spoken of by Theron, which I submit he would have done if such an agreement had been made. Further he had been instructed by Theron to claim 5 per cent. commission from Tiffin on all accounts settled by him at the expiration of his contracts. Why was this not done? It was his duty as agent to have done this. If he had been so instructed he would have referred to this in his evidence. He renders defendant (Theron) a statement of all moneys paid by him and has never claimed the commission from Tiffin on behalf of his client. I verily believe that no instruction was given to Hall to demand this commission. Tiffin denies all reference to commission to be allowed to Theron, but admits the commission to Hall in consideration of his acting as surety for Theron. This commission Hall admits receiving. Apart from the evidence of Tiffin (plaintiff) I was sufficiently satisfied from the evidence of Hall, Theron's principal witness, and the representative of the well-established firm of Schweizer, that if Theron was not speaking the truth he was certainly mistaken; that great reliance should be placed on Hall's evidence, he being the specially appointed agent of Theron, and one who would certainly in the interests of his client (Theron) have claimed commission if instructed to do so. Under all the circumstances, taking into consideration the relationship between Hall and Theron, and the evidence of Hall, rather stating than corroborating the evidence of Theron, I had no hesitation in coming to the conclusion, that Theron's evidence could not be relied upon, and therefore overruled the exception as to my jurisdiction being ousted.

Mr. Schreiner cited *Brady* v. *Michiel* (3 Juta, 178) and *Brett* v. *Soliman* (4 Juta, 6). It was argued in *Brady* v. *Michiel* that though the Resident Magistrate was not obliged to hear

plaintiff, yet he was able to do so. The Resident Magistrate must distinguish between satisfying himself as to the *bona-fides* and as to the merits.

Mr. Graham referred to *Dias* v. *Laurence** (5 Sheil, 409) and *Le Roes* v. *Golding* (12 Juta, 371). In the last two cases the parties went into the merits of the case to satisfy the Resident Magistrate whether the counter-claim was *bona-fide*.

Mr. Justice Maasdorp: What is a *bona-fide* claim? Is it not that the claimant intends when the action comes on to fight for his own claim?

Mr. Graham: Yes, but the Resident Magistrate must be satisfied that he so intends.

The appeal was allowed.

The Acting Chief Justice said: This case raises an interesting question which has been frequently discussed in this Court, viz., as to the proper procedure to be followed in the Magistrate's Court, when a counter-claim is set up by the defendant for an amount beyond the Magistrate's jurisdiction. The rule to be deduced from previous decisions is, that when such a claim is made the Magistrate should take evidence to satisfy himself that the claim set up is a *bona-fide* one. What is meant by this? It is not meant that it must be shown that the claim is one that will ultimately be established when tried on the merits, but that the defendant is not seeking to prevent the hearing of the plaintiff's case by setting up a fictitious counter-claim. The defendant must show that he truly believes he has a claim against the plaintiff, and that he persists in that claim. To establish this in many cases it is not necessary to do more than take the defendant's evidence, and it is not necessary to hear the plaintiff's evidence in reply, but I am not prepared to lay down any hard and fast rule that the Magistrate would be wrong in hearing any evidence tendered by the plaintiff to show that the counter-claim was not made *bona fide*. In this case it is evident that the Magistrate has done more, and has gone into the merits of the counter-claim. He does not seem to doubt that the counter-claim was set up *bona-fide*, but he has come to the conclusion after going into the case that the evidence is not such as to induce him to believe that the defendant would succeed in establishing his case, and therefore he overruled the objection taken as to jurisdiction. Under these circumstances I think that the Magistrate has erred. The appeal must be allowed with costs, and the objection taken in the Court below sustained with costs.

* 12 Juta, 404.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

ALLENZENSKI v. ALLENZ"NSKI. { 1896. Aug. 19th.

Mr. Searle, Q.C., appeared for the plaintiff. Defendant in default.

This was an action brought by Louis Allenzenski, residing on the Sandfontein farm, in the division of Caledon, against his wife Caroline. Originally the action was also brought against one Joseph Yates. The parties were married at Cape Town in community of property, in March, 1889. There are two children living. It was alleged that during 1895 and 1896, in Cape Town, the defendant committed adultery with the second-named defendant. The prayer was for a decree of divorce, with custody of the children and costs, and as against the defendant Yates, for £500 damages and costs. The defendant Yates had since tendered £20 damages and costs, which had been accepted, and action against him was withdrawn.

Reginald Barry, clerk in the Colonial Office, produced the register of marriages, which showed that the marriage took place on the 20th March, 1889.

Louis Allenzenski, the plaintiff, said was he married seven years ago, and went to Caledon to live. He was a trader. He further lived in the Caledon district, on the Sandfontein farm, and he and his wife lived with his father. Witness went periodically on trading trips. There were two children alive out of four; one was four years of age and the other five. His wife left him to do some business in Cape Town. She left to start a shop with his consent. She had money with her that witness gave her. She went to live in Boom-street. Witness had a letter from her written in Hebrew. Afterwards his father brought a letter from her dated from Rose-street, stating that she had never lived happily with witness, and also that if he wanted another wife she would get another husband, if witness would pay divorce expenses. Witness had never ill-treated his wife. She accused witness of

unfaithfulness. She took the youngest child with her to town. Witness had not seen his wife since last May, when she was living at No. 1, Hope-street. He found the child living with a coloured woman, and he took it away. his wife being willing for him to do so. She was living in a house of ill-fame—a German brothel. Witness had no property.

Blanche Linkerton, a child about eleven years of age, said she lived in Chiappini-street. She was adopted by Mrs. Luke, but before this she lived with her mother in Rose-street. She knew a Mrs. Lewis whom she lived with in Bree-street, and was in service with her. She did not know her age. When she lived with Mrs. Lewis there was a man living in the house and a little child. Witness slept in a room of her own. Mr. and Mrs. Lewis (Mrs. Allenzenski) slept in the same room. She took them their coffee in the mornings. Plaintiff was not Mr. Lewis. She had since seen Mr. Lewis in Caledon-street. Witness had to do housework and had to look after the little child.

Maria Smit, a coloured woman, 42, Rose-street, said her husband was Johannes Smit, a labourer. She adopted the previous witness, who was now in service with Mrs. Lake. Witness knew Mrs. Lewis, who lived in Rose-street and had a small shop there. Witness at first looked after the child. Witness's adopted daughter went to service with Mrs. Lewis in Bree-street, and remained there three weeks. Witness took the previous witness away, as she did not like her to be in the company of Mrs. Lewis. Witness met Mrs. Lewis on the Queen's Birthday, and afterwards Mrs. Lewis came to see witness, when she noticed that Mrs. Lewis was stout. Mrs. Lewis said she was pregnant.

Dr. Dixon, one of the Medical Inspectors under Act 39 of 1885 said that the photograph produced was that of a woman he knew as under medical inspection. She had been under inspection about five months, and now living at 6, Sydney-street. Her name was registered as Lena Smith.

The Court granted decree of divorce, plaintiff to have custody of the children; defendant to have access to the children at all reasonable times and places.

[Plaintiff's Attorney, G. M. Walker.]

WELLS V. RONDEBOSCH MUNICIPALITY. | 1886. Aug. 19th. „ 20th.

This was a case in which the plaintiff prayed for a declaration of rights as to the boundary line of certain property situate in Rondebosch.

Mr. J. Rose-Innes, Q.C., with whom was Mr. Tredgold, appeared for the plaintiff.

Mr. Schreiner, Q.C., with whom was Mr. Jones, for the defendant.

The following was the plaintiff's declaration:

1. The plaintiff resides at Rondebosch in the Cape Division, and he is registered owner of a certain piece of land with buildings thereon called "Armagh Villa," being lot A of the subdivided estate Myrtle Grove, situated at Rondebosch aforesaid. The defendant is the Rondebosch Municipality, a body duly incorporated under the provisions of Act 45 of 1882.

2. Adjoining the said property of the plaintiff on the west side is a public thoroughfare called Myrtle-road, and the true boundary of thesaid property on the said side is shown by the line A B marked upon the plan annexed to this declaration. Before the commencement of this suit, there were at the spots indicated by the letters A and B upon the said plan, two iron pegs or beacons to mark the line of the plaintiff's boundary.

3. The defendant Municipality wrongfully denies that the said line A B is the limit of the plaintiff's property, and wrongfully contends that the said beacons encroach upon the said thoroughfare.

4. In or about the month of February last, the defendant Municipality by its servants or agents wrongfully or unlawfully entered and trespassed upon the plaintiff's property, and erected a lamppost on the said property at or near the spot marked X upon the said plan.

5. In or about the month of March last the defendant Municipality by its servants or agents wrongfully entered upon the plaintiff's property and unlawfully removed the iron beacons aforesaid and they also again trespassed on the said property by unlawfully coming upon it to remove the lamppost previously erected by them.

6. The plaintiff is entitled to be paid the sum of £100 for damages in respect of the trespasses hereinbefore alluded to.

The plaintiff claims:

(*a*) An order declaring that the true boundary of his said property upon the west side is the line A B marked upon the plan hereto annexed, and interdicting the defendant from in any way interfering with his beacons at the point A and B.

(*b*) Payment of the sum of £100 as aforesaid.

(*c*) Alternative relief.

(*d*) Costs of suit.

The following was defendant's plea:

1. The defendant Council admits the allegations in paragraph 1 of the declaration, and admit, that on the west side of the plaintiff's property there adjoins a public thoroughfare called Myrtle-road.

2. At certain spots in the said road and not on his property, the plaintiff caused to be placed two beacons, whereby the plaintiff trespassed and encroached upon the said road and the defendant Council as they lawfully might do, caused the said beacons to be removed.

3. The defendant Council, does not admit the correctness of the plan annexed to the plaintiff's declaration, or that the spots A and B or the spot X alleged to be marked thereon are correctly indicated, but refers this Honourable Court to such proofs as the plaintiff may adduce in proof of the said plan and spots.

4. The defendant Council says that in error it caused a certain lamp and post to be erected within the plaintiff's property, which was with the plaintiff's consent removed in March last, but no injury or damage was caused to the plaintiff, nor was any trespass knowingly or wilfully committed in erecting the said lamppost. Notwithstanding the premises the defendant Council hereby tenders to the plaintiff, the sum of one shilling, with Magistrate's Court costs to date in respect of the trespass unwittingly committed in erecting the said lamppost.

5. Save as aforesaid the defendant Council denies all allegations in paragraphs 2, 3, 4, 5 and 6 of the declaration.

Wherefore the defendant Council prays that the plaintiff's claim may be dismissed with costs.

The replication was general. On these pleadings issue was joined:

For the plaintiff was called:

James Jarvis Bisset, Government land surveyor, living at Kenilworth, said he knew Mr. Wells's property. He surveyed it in April, 1885. At that time wooden palings were erected along the line A B. There were no traces of another fence, but there were traces of a myrtle hedge—shrubs at irregular intervals. The remains of the hedge were just inside the palings. The line A B was a bank about a foot high, with fir trees just inside the palings. He saw no reason for changing the fence. Witness surveyed again about five months ago, when he found that the old paling, A to B, had been removed. There were still traces of the myrtle hedge. Plaintiff had put up a new paling which, at the point A, was about three feet inside, and at the point B fifteen inches inside. From what he observed he had no hesitation in telling Mr. Wells to keep the line A B.

Cross-examined: He thought the survey made in 1879 was unquestionable. This fixed the line A B. He had made use of the 1863 survey, and to a certain extent the myrtle hedge guided him. He was guided mainly by Mr. Kuys' survey made in 1879. He had not surveyed Mr. Thorne's property, so could not say whether or not his stables were an encroachment upon the road. Mr. Borcherds' survey showed Mr. Thorne's stables as an encroachment upon the road. He, however, thought Mr. Kuys' survey more reliable. It was an open question whether Thorne's wall was an encroachment or not. According to witness's plan there was no encroachment. If plaintiff fenced up to his corner according to witness's survey it would be very awkward for the public.

Re-examined: Witness had no doubt that the point A was the corner of the old fence. The accuracy of his measurements did not depend solely on the points A and B. Mr. Kuys was an accurate surveyor, who used to pay great attention to his work. The width of Myrtle-road was about 17½ feet, taking the myrtle hedge.

P. K. Maskew, sworn Governmentl and surveyor, said he worked under Mr. Kuys when he surveyed in 1879. Witness was asked to verify Mr. Bisset's work for the purposes of this case. He had Mr. Kuys' old plan before him. He surveyed right up to where Mr. Kuys' survey went, and it agreed within an inch. He would not call this an appreciable difference. It would be only about three inches in a line of 300 feet. Mr. Bisset's location of the points D and A showed a slight discrepancy of five inches, but this was not sufficient to call for readjustment. Roughly speaking, the line A and B would run along the bank at the edge of the road.

Cross-examined: If the myrtle hedges and oak hedges were entirely obliterated the survey could not be laid down to agree with that of 1860. Witness had never seen the old fence.

Philip Arendse, gardener to the plaintiff, said he put in a pole as a beacon two inches from the iron peg more towards the house. He had seen the wooden peg near Mr. Thorne's corner, and the fence was inside this. He remembered the old railing which was close to the myrtle hedge, but the man before him took the hedge out.

Cross-examined: He knew the pine trees which were close to the old wooden fence. He put the posts in by the plaintiff's authority.

Gustavus Trollip said he was acting as attorney to the plaintiff. The correspondence put in showed the matter in dispute between the parties, and witness wrote nearly all of them. He wrote in April, 1895, to the defendants to the effect that the plaintiff, although he put the fence further back, still maintained his original boundary. He had known the place about twelve years. Plaintiff's object in putting the fence back was that it might not run the risk of being broken down by traffic.

Cross-examined: The new fence was not their boundary, and was only erected so that they might get a straight line. The trees stood outside the present paling.

This closed the case for the plaintiff.

For the defence.

David Home said he was sixty-two years of age, and resided at Rondebosch. His father used to be the proprietor of the estate. In 1860 his father was dead, and witne s acted for his mother, the executrix. In that year a portion of the estate was sold for building lots. There was a general plan. The tracing put in was a copy of that plan. On the Myrtle-road side there was a myrtle hedge fully developed, and also on the Grove-road side. Thorne's property was sold at that time, and that was also bounded by a myrtle hedge. The hedge was now overgrown with plumbago, the myrtle hedge being inside the plumbago.

Cross-examined: The bank was even wider than it is now at the time of sale. Until the sale in 1860 there was no public thoroughfare there. There was a private road between myrtle hedges. There might still be some little pieces of myrtle cropping up on the railway side.

By the Court: He had not measured the distance between the two myrtle hedges.

John Williams, inspector to the defendant Municipality, said he had been inspector six years. He knew the plaintiff's property. He remembered there was a fence which the plaintiff removed. Complaints were made as to the two iron pegs obstructing the roadway, and afterwards wood rails were put up by the plaintiff which proved a still greater obstruction. On the instructions of the Municipality witne s took down the two pieces of wood produced.

[At this point the case was adjourned to enable the Court to view the ground of contention, and so that the surveyors on each side might meet and agree as to consistent marks upon their plans, and that the different points might be more clearly understood.]

Postea (August 20).

Joubert H. H. Watermeyer, Government land surveyor, said he had surveyed the properties, the boundaries of which were in dispute at the end of last September. He knew of no old fixed landmarks by which he could make the survey. The survey of 1861 seemed to have been made on the basis of the hedges which showed the line, but the road itself was the actual boundary. There was an existing myrtle hedge on Mr. Thorne's property. The stumps that could clearly be seen were not myrtle stumps. The fir trees outside the existing fence seemed to be about forty years old; the trees inside were much younger. He found that Borcherds' survey of 1870 coincided fairly well with his own. This showed the projection of Mr. Thorne's stable. The stable wall fairly indicated the line taken up by Mr. Bisset, much more so than witness's survey did.

Cross-examined: The plans showed that the lots were bounded by the roads with a myrtle fence just inside. The whole of his survey depended upon the position of Grove-road. He did not know who laid out Grove-road. He was not prepared to say that Grove-road was laid out by a surveyor, though he should think it was. Grove-road was bounded by Mrs. Piers's property, which property was surveyed by a surveyor. Mr. Kuys was a very accurate surveyor. The right boundary of plaintiff was, in the opinion of witness, a foot over the point A, and a few inches inside the point B. This was taking the basis of Grove-road. It was difficult to get to Thorne's myrtle hedge, as it was covered up with plumbago; he could therefore only speak approximately as to this.

J. J. Bisset, (recalled) said that the difference between himself and Mr. Watermeyer was very little: only a few inches.

William Alexander Batchelor, clerk to the Municipal Council of Rondebosch, said he had occupied the post of clerk to the Municipality since 1886. He knew the property, the boundaries of which were in dispute. Since 1890 his attention had particularly been drawn to the plaintiff's property. There was a dispute between the previous owner (Mr Dobell) and the Municipality, and Mr. Dobell admitted that the old fence was an encroachment. Witness had inspected the old fence several times. It went from the town corner to the centre of the trees, and then ran outside the trees nearer Rouwkoop-road. The galvanised iron fence was put up by Dobell in 1890. The myrtle hedge at Grove-road corner would have been two or three inches inside the present fence. The iron fence had never been renewed or removed. Complaints were made by the public as to the obstruction caused by the fence. Mr. Thorne agreed to round off the corner in Grove-road if the Council allowed his encroachment to remain.

Cross-examined: Some of the myrtle sprouts were inside the line, some outside the line, and some on the line itself.

William Lancaster, butcher and contractor said he had lived at Rondebosch twenty-six or twenty-seven years. He knew the property of the plaintiff when he first lived at Rondebosch, and he remembered the myrtle hedge, which was his boundary. There were a few trees outsid

the myrtle hedge, and many inside. Witness bought all the trees inside the hedge, and was told not to cut any outside the myrtle hedge or on the line.

This closed the case for the defendant Municipality.

Mr. Innes, for plaintiff, referred to *Visser* v. *Du Toit* (5 J., 94).

Mr. Schreiner, for defendant, cited Act 45 of 1882 section, 159; and *Visser* v. *Du Toit* (5 Juta, 94).

The Court gave judgment as follows:

Acting Chief Justice: The plaintiff in this case alleges that his property is bounded on the west side by a line marked A B on the diagram annexed to the declaration, and alleges further that the defendant Municipality came upon his property within that line, and removed certain beacons which he placed on that line. There was a further complaint as to a lamppost, but that has been disposed of. In answer the defendants say that at certain spots in the road, and not on the plaintiff's property, the plaintiff caused two beacons to be placed, and that the defendants caused these beacons to be removed as being encroachments. This raises the question as to the true boundary of the plaintiff's property on the west. I quite agree with Mr. Schreiner that the onus is upon the plaintiff to show what that boundary is. It has been shown in evidence that in 1860 certain lots were cut off and sold out of Mr. Home's estate. According to the diagram then made and by the deed of transfer the boundary on the west side is described as being the road. A sale plan, prepared for the sale in 1860, shows that there was a myrtle hedge on the ground; but both plan and diagram as well as the title deed do not take this hedge as the boundary, on the contrary it is common cause that the boundary was intended to be the road. We have now to try and ascertain where this road ran in 1860, at which time it was nothing more than a mere track. Mr. Bisset has now gone to the extent of the land on the south side of the property, and surveyed from the extremity of the late Mr. Home's estate. He has found that the corner beacon on the road in question comes out at the point marked B on his diagram, and on the north side he finds the beacon at the spot A. In 1879 a survey was made by Mr. Kuys, a most accurate man, of another portion of the estate. Mr. Maskew, who was then with Mr. Kuys and who is in possession of the working plans, found that the beacons on the east side correspond with the two beacons which Mr. Bisset has marked on his plan as at C and D. Measuring from C and D down the road giving the plaintiff the extent of land which his predecessor bought in 1860 brings the boundary line out as near as possible at the two spots A and B. Mr. Bisset said that he found the road about 17 feet or 17 feet 6 inches wide. It is strongly contended that the line A B must be determined by the features of the ground—viz., by the old myrtle hedge. This hedge has long since been cut down. We have had an opportunity of inspecting the ground, and we can see distinctly there is a trace of the myrtle hedge which grew on the other side of the road—in some places it is nearly three feet wide. There are some indications of myrtle growing along the plaintiff's side of the road, and, as far as I could judge. I have not the slightest hesitation in saying that this myrtle hedge could not have been on the inside of the present line of palings. I think the old hedge stood outside the line now claimed. I have come to the conclusion, after our inspection, that the line A B should be taken as the true boundary of the property. One point strongly in favour of the line now claimed is that if the western boundary is shifted further eastwards the line between the two streets must be shortened. The present line is already shorter than the one marked on the diagram. It is clear that the old track did not run up to the present fence; but the road seems to have been widened from time to time nearer to the fence. But under no circumstances can there be a strip of ground between plaintiff's fence and the road. The road is his boundary. I think therefore that, judging from the diagrams, from the surveys of Mr. Kuys, Mr. Bisset, and Mr. Maskew, and from the natural features of the ground and the positions of the road and the trees, the plaintiff is entitled to have it declared that the true line of fence is the line claimed by him—the line A B. Nothing has been said about damages, These are so slight as hardly to be worth an action at law. The amount of land in dispute is so trifling that it is greatly to be regretted that legal expenses should have been incurred about it. The plaintiff is, however, entitled to nominal damages. There will therefore be judgment according to the prayer of the petition declaring the line A B the true boundary of the plaintiff's property on the west; 20s. damages and costs.

[Plaintiff's Attorneys, Messrs. Reid & Nephew; Defendant's Attorney, Gus. Trollip.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

ADMISSION.

On the application of Mr. Smuts, Mr. Jacob de Villiers Roos was admitted an advocate of the Supreme Court.

PROVISIONAL ROLL.

HARTE V. FRAME. } 1896. Aug. 20th.

Mr. Close applied for provisional sentence on the instalments due on a mortgage bond of £560 and on an I O U for £21, less £11 paid on account.

Granted, subject to the stamping of the document.

OLIVIER V. POTGIETER AND ANOTHER. POTGIETER V. OLIVIER. } 1896. Aug. 20th.

Provisional sentence—Promissory note—Erased Indorsement—Legal holder—Interdict—Lessor—Ejectment—Motion—Practice.

O. *sued* P. *for provisional sentence on a promissory note made in favour of* O., *which had been endorsed by him in favour of a bank, but which had come into* O.'s *hands again thereafter. A formal endorsement in favour of* O. *by the bank was made after service of summons though the endoreement in favour of the bank had been erased.*

P. *applied for an interdict against* O. *to prevent his trespassing on land belonging to* O., *but which* P. *claimed to hold on a lease, asserted by* O. *to have expired.*

O., *thereupon also applied on motion for a decree of ejectment against* P. *on the ground that any right* P. *may have had to occupy had expired.*

The Court:

(1) Granted *provisional sentence on the note on the ground that* O. *was the legal holder and could sue without the additional endorsement by the bank.*

(2) Refused *to grant the interdict, as applicant had not made out a clear right.*

(3) Refused *to grant the decree of ejectment, it not being practice of the Court to grant such an order on motion.*

These were three cases between the parties which for convenience were taken together, viz.:

1. Olivier v. Potgieter and Another: Mr. Schreiner, Q.C., applied for provisional sentence on a promissory note for £314 6s., dated April 4, 1896.

Mr. Searle, Q.C., appeared for the defendant J. J. Potgieter.

2. Potgieter v. Olivier: Mr. Searle, Q.C., applied for an interdict restraining the respondent from trespassing on portion of the farm Zeekoe River, situate in the division of Oudtshoorn, and at present occupied by applicant, and from interfering with the right of water to which the said land is entitled.

3. Olivier v. Potgieter: Mr. Schreiner, Q.C., applied for an order requiring the respondent to quit and yield possession to the applicant of certain land and premises, situated at the farm Zeekoe River, situate in the division of Oudtshoorn, unlawfully occupied by him, or for an interdict restraining him from interfering with applicant and his servants in their farming operations.

The facts in these cases were as follows:

No. 1. Olivier v. Potgieter: The facts are sufficiently shown in the judgment.

Mr. Searle for defendant took the preliminary point that the note was negotiated to the bank and that the bank ought to sue. Even if the endorsement that now appears as made by the bank was a formality, defendant must take the note as it was served on him.

No. 2. Potgieter v. Olivier: The applicant Jacobus Johannes Philippus Potgieter deposed:

1. That I am an agriculturist residing at Zeekoe River in this division.

2. That about nine or ten years ago my father and I entered into an agreement with the respondent, by which we worked a certain portion of the farm Zeekoe River, the property of the respondent on shares, *i.e.*, we received a certain share of the yield and the respondent the other share.

3. My father and I continued farming the said property in partnership with the respondent until about the end of April, 1895, when the respondent suggested that my father and I should separate, and each one act for himself.

4. This we did, and the respondent divided the lands between my father and myself. There

was no dwelling-house on that portion which fell to my share, and the respondent pointed out to me the place where I could build myself a house and make a dam. On my asking him on what conditions I was to build the house and make the dam, he replied "that as long as he was the owner of that portion of the land I could remain on it, but should he sell it he would pay me the improvements."

5. I spent at least £100 in making the house and dam, and cleaning the land.

6. A few months ago owing to certain differences between us, the respondent threatened to eject me, and I heard that he had told others that as soon as he returned from Cape Town he would forcibly eject me.

7. Mr. Piet Lategan, a son-in-law of the defendant, commenced to divert my water and trespass on my ground. I then caused letters to be written to him (copies of which are annexed marked A and B) and also a letter to the respondent, a copy of which is annexed marked C.

8. As the said Lategan acknowledged to me that he was in the wrong, and that he would not trespass again, I took no further steps against him.

9. On the 3rd August last, and after the respondent's return from Cape Town, while I was cleaning tobacco plants in my garden about 130 yards from my house, one of the respondent's boys named Jan Balie came into my garden and tried to drive my horse which was grazing there out of it. On my asking him why he was doing it, he said that he was acting under the respondent's orders, and that he was to impound the horse.

10—17. [Various acts by the respondent and his servants are deposed to—such as driving applicant's horse out of the garden—entering on the premises—removing the entrance gate—threats of forcible ejectment.]

18. The respondent has told me and others that he would take the roof off my house, and as I fear that he will do so, more especially during my absence from home, and knowing the violent temper he was in and fearing the consequence should he attempt to remove the roof of my house, which I have every reason to believe he will, I appeal to this Honourable Court for protection in granting an interdict restraining the respondent from coming on the property in my lawful possession, and preventing him from taking the law into his own hands by forcibly ejecting me, and also that he be restrained from interfering with my share of the water.

Gert Cornelis Olivier, the above respondent, deposed:

I. To avoid prolixity deponent will confine himself to such points only as are material to the issue of the present application. The allegations of a personal nature contained in applicant's affidavit, many of them not in accordance with facts, deponent passes over.

II. Deponent admits that for some years applicant and his father occupied land belonging to deponent as "bijwoners." Deponent annexes hereto two contracts entered into between him and his "bijwoners" and craves leave to refer your lordships to the terms thereof. (A and B.)

III. In reply to paragraph 3 of applicant's affidavit deponent saith that about the date set forth in said paragraph applicant had a serious disturbance with his father threatening to commit acts of violence; it was then that deponent in the common interest of himself and his "bijwoners" located applicant elsewhere, but as will be seen from annexure B the tenancy continued to be a joint one.

IV. The allegations contained in paragraph 4 of applicant's affidavit commencing with the words "On my asking him on what conditions, &c., &c., deponent can only characterize as absolutely incorrect and devoid of truth. With reference to the other portion of said paragraph, deponent saith that a suitable dwelling existed on the spot where he located the applicant; that the latter thereafter during deponent's absence in Cape Town, and without his consent purchased material at one of the local stores, removed the then existing roof of the said dwelling, and replaced it with an iron one.

V. Prior to the expiration of the contract contained in annexure B deponent caused a notice, copy of which is hereunto annexed marked C, to be served on the applicant.

VI. The applicant failed to comply with the terms of the aforesaid notice; he never saw deponent about the renewal of his contract, nor did he give any notice of his intention.

VII. By virtue of his ownership, the powers vested in him, and rights reserved and specially set forth in aforesaid notice, deponent thereupon, at the expiration of the term of the applicant's contract, took possession of his property, of which the applicant had due notice.

VIII. That deponent thereafter on several occasions formally called upon applicant to quit and yield possession to deponent of the premises and land he still lays claim; this the applicant has neglected and failed to do; he continues in possession, and interferes with deponent, his servants and cattle, the latter of which he impounds.

SUPERME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

NESER v. INNES. { 1896. Aug. 21st. „ 25th.

Bailment – Deposit—Cession of action—Assignation — Delegation— Novation — Action against substituted debtor—Sale—Credit—Insolvency— Undue preference.

N., *an auctioneer, held a sale of stock, the sale being for cash or (at* N.'s *discretion) at three months credit, subject to promissory note being given with endorsees as sureties.*

B. *purchased goats and removed them under a promise to send the required notes, which he failed to do. After various negotiations, however,* N. *consented to accept a bill by* W. *for a portion of the amount, and to allow* B. *to sell the goats (a large number of which had already been placed in* I.'s *hands as an auctioneer) provided the proceeds were remitted to* N.

B. *thereupon signed an order upon* I., *so to pay the proceeds to* N., *and this order* N. *sent to* I. *that day, but the goats then in* I.'s *hands were not sold by him but by* B. *privately.*

Subsequently, B. *sold some of the goats to* C., *who asked* I. *to advance the money. A portion of this* C. *drew, and the balance he left in* I.'s *hands to pay* N.; *thereafter* I. *sold more of the goats.*

At the request of B., I. *undertook to send the money to* N. *on the 19th June. But on the 16th June* I. *discovered from a conversation with* B. *that he was in financial difficulties and intending to surrender his estate.*

I. *thereupon declined to send the money to* N. *as it would defraud the creditors, and after* B. *had drawn up his schedules on the 18th June,* I. *persuaded* B. *to sign a letter to* I. *authorising him not to pay over the amount to* N.

The surrender was not accepted till the 26th July, and I. *was elected trustee, and declined to pay* N., *holding that he was bound to account to the estate and not to* N., *even though* N. *offered to indemnify him.*

The Court held *that* I. *was merely a depositary, that even if he had been* B.'s *debtor there had been an assignment of* B.'s *right to* N., *acquiesced in by* N. *and* I., *and ordered* I. *to pay the whole amount to* N.

This was a case in which Charles August Neser, auctioneer, Graaff-Reinet, sued one Alexander Innes, auctioneer, Murraysburg, to recover £154 4s. 3d., with interest.

Mr. Searle, Q.C. (with whom was Mr. Tredgold), for the plaintiff; Mr. J. Rose-Innes, Q.C. (with whom was Mr. Benjamin), for the defendant.

The plaintiff's declaration was as follows:

1. The plaintiff is Charles Augustus Neser, carrying on business at Graaff-Reinet as an auctioneer; the defendant is Alexander Innes, an auctioneer and general agent, carrying on business at Murraysburg.

2. On or about March 21, 1896, the plaintiff sold by public auction certain goats, upon conditions that the purchaser should pay cash for the same upon delivery, but the plaintiff reserved the right to give credit for three months, upon receiving promissory notes signed by the purchasers, and endorsed by sureties to the satisfaction of the plaintiff.

3. At the said sale one H. S. Bosman purchased seven hundred and thirty-five of the said goats for £514 12s. 11d., and removed the same without paying cash or giving security as aforesaid.

4. Thereupon the plaintiff demanded from the said Bosman, that he should redeliver the said goats as and being his property; and thereafter on or about April 9, the plaintiff agreed with the said Bosman, that the said Bosman should give the plaintiff a promissory note for £100, endorsed by one Watermeyer, in part payment of the purchase price, and that the plaintiff would allow the said Bosman to sell the goats purchased by him or a portion of them through the defendant, on condition that the defendant should forthwith upon the sale of the said goats hold the price thereof for and on behalf of the plaintiff, and should remit the said amount to him.

5. The defendant was informed of the said agreement and assented thereto.

6. On or about June 5, the defendant had in his possession a sum of £154 4s. 3d., portion of which was the proceeds of the sale of the said goats, and the balance was money

belonging to the said Bosman, which the said Bosman instructed the defendant to pay over to the plaintiff in satisfaction of his aforesaid liability.

7. It became the duty of the defendant to pay over the said sum of £154 4s. 3d. to the plaintiff, but he failed and neglected to do so.

8. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to recover from the defendant the said sum of £154 4s. 3d., so received by him on behalf of the plaintiff, but the defendant neglects and refuses to pay the same.

The plaintiff claims:

(*a*) Payment of the sum of £154 4s. 3d., with interest *a tempore moræ*.

(*b*) Alternative relief.

(*c*) Costs of suit.

The following was the defendant's plea:

1. He admits the first paragraph of the declaration.

2. As to the 2nd, 3rd and 4th paragraphs, he was no party to the transactions therein referred to, and has no personal knowledge thereof; he does not admit the allegations referred to, and has no personal knowledge thereof; he does not admit the allegations in the said paragraphs contained, but he ask leave to refer this Honourable Court to such proof thereof as the plaintiff may adduce.

3. On or about the 9th April, 1896, the said Bosman requested the defendant to sell on his account certain Angora goats, about 400 in number; and he authorised the defendant to remit the net proceeds of the sale to the plaintiff. Thereafter the defendant did offer the said goats for sale by public auction, but no sale was effected; of which fact the defendant duly informed the plaintiff.

4. Thereafter on or about the 30th May, the defendant, at the request of the said Bosman, sold for him by public auction certain 249 Angora goats. The said goats were not the same goats as those referred to in the third paragraph of this plea, and they were sold by the defendant at a credit of three months.

5. The net proceeds of the said sale, payable in three months as aforesaid, amounted to £104 4s. 3d. On or about the 5th June, the said Bosman requested the defendant, who at that time had agreed to advance a further sum of £50, to the said Bosman, for account of R. Bosman, to remit to the plaintiff on or about the 19th June, the sum of £154 4s. 3d. This the defendant consented to do, and on or about the 5th June, he informed the plaintiff that he would remit to him the said amount on the 19th of the said month. Subject to the above he denies the allegations in the 5th and 6th paragraphs.

6. On the 18th June, and before the defendant had remitted the said money, he received notice from the said Bosman, that he was insolvent and contemplated the surrender of his estate, and he instructed the defendant to give due notice of his the said Bosman's intention to surrender his estate; the said Bosman further requested the defendant not to remit the said money, but to retain it as part of his estate.

7. On the 24th July, 1896, the estate of the said Bosman was duly surrendered as insolvent.

8. He admits his refusal to pay to the plaintiff the sum of £154 4s. 3d, but he denies all the other allegations in the 7th and 8th paragraphs of the declaration.

9. He submits to this Honourable Court that he is bound to account to the person in whom the estate of the said Bosman is vested for the said sum of £154 4s. 3d.

Therefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

For the plaintiff,

Charles August Neser, the plaintiff, said he was an auctioneer at Graaff-Reinet and was a Justice of the Peace. On the 21st March last he sold, in Graaff-Reinet, certain goats for Messrs. Le Roex, Murray, and others, under certain conditions of sale, a copy of which was produced. Mr. H. S. Bosman was present, and bought 735 goats for £514 12s. 10d. Witness had had no business with Mr. Bosman before, but witness's clerk had seen him and explained the conditions of sale to be cash, or three months' credit on approved security. Afterwards Bosman came to witness's office and said he had come to settle. Witness asked if he was prepared to give cash or cheque. He said promissory notes. Witness asked who were to be the endorsers, when Bosman said that would be all right. Witness drew out the note and left blanks for the names of the endorsers. On the 26th March witness wrote to Bosman, saying that unless satisfactory notes were sent, the goats must be re-sold and Bosman held responsible for the deficiency. The notes were afterwards sent without endorsements, and were returned. Bosman afterwards got the consent of witness to the defendant selling the goats. Afterwards in June witness received a letter from defendant, promising to pay the £154 4s. 3d., and subsequently a telegram was received by witness from defendant: "Bosman surrendered his estate. Kindly give me your claim. Letter to-morrow's post." A letter was afterwards written by defendant to witness stating that before instruc-

tions to pay witness the amount in dispute were received Bosman had sent in his schedules, and therefore defendant was not justified in paying over the amount.

This closed the plaintiff's case.

For the defence,

Alexander Innes, the defendant, said that on 17th April Mr. H. S. Bosman came to him as to the sale of 400 goats, and asked witness to sell them. Bosman did not mention plaintiff's name at that time, nor did he mention the conditions under which he had bought the goats. He afterwards got a letter from Bosman authorising him to pay the proceeds of sale over to plaintiff. The 400 goats were not sold, but were withdrawn from a sale at Kotze's Kraal, and witness had nothing to do with them. Afterwards at a sale at Murraysburg witness put up 249 Angora ewes at a sale, and sold them for about £104. This was by Bosman's instructions. He did not know until June 5 that plaintiff had anything to do with these goats. The 249 goats were sold for cash or three months' credit. Witness gave credit, and had not yet been paid. The notes fell due on August 30. He had no personal interest in Bosman's estate. He had a claim for £15, but he should not prove on the estate.

Cross-examined: The £15 had nothing to do with the amount in dispute. Witness was the trustee in the estate. He doubted whether he would get £15 for his work in connection with the estate.

W. H. van der Merwe, clerk, Murraysburg, said that from April to July last he assisted the defendant with his sales. The conditions were according to the roll put in. On 5th June Bosman asked defendant to advance proceeds of the sale of 249 goats, to be paid to plaintiff. Defendant said he could remit the money on the 19th June, as the bill was due to the plaintiff on the 21st June. Afterwards defendant and Bosman had a private interview, and witness subsequently heard defendant say in Dutch, "We'll leave it so, then; I shall not send the money.

This closed the case for the defendant.

Mr. Searle for the plaintiff said: The case will have to be decided on the letters and documents, &c., put in. Now clearly Bosman substituted Innes as debtor, and Innes accepted the position, as is shown by his letters.

Mr. Justice Buchanan: Isn't Innes rather a stakeholder? If so, the question is for whom.

Mr. Searle: If that is so, clearly he is holding for Bosman. Neser clearly never gave any credit to Bosman. But Innes had clearly taken over the liability, it was Innes's cheque that was sent, and Bosman was actually debited with commission on that cheque. *Wingrove* v. *Goodchild* (6 H.C., 164) is a similar case in many respects, even though no insolvency intervened. The English case of *Walker* v. *Bastron* (9 Meeson and Welsby, 411) was one where it did intervene. Also see *Hamilton* v. *Spottiswoode* (18 L J., Exchcq., 393); *Lilly* v. *Hayes* (5 Ad. and El., 548); *Wilson* v. *Copeland* (5 Barn. and Ald., 228); *Liversedge* v. *Broadbilt* (28 L.J., Ex., 332).

[On the question of consideration the Court intimated that it did not wish to hear counsel.]

This case might also be treated from point of view of assignment. The principles are laid down in *Wright* v. *Colonial Government* (8 J., 260): that case being decided indeed under English law. But it was there pointed out that it would have made no difference if it had been decided under our law, there being no substantial difference. *Wright* v. *Bannister* (3 L.R., 569), and others show clearly that in English law where A. directs B. to pay C. on A.'s behalf and B. accepts, B. is bound to pay. Delegation of a debt (or as Van der Linden calls it assignation) accepted gives right of action by creditor against the debtor's debtor. The point is what was the transaction between Bosman our debtor and Innes the substituted debtor.

Mr. Innes: We can not treat the claim in the alternative as plaintiff's counsel has done. The pleadings show clearly that plaintiff was vague as to his clear right. It must be either delegation, or cession of action, or contract. Now in his letter enclosing the account, Neser gives Bosman credit—obviously, for he charges interest on the purchase price. Hence Neser has no right of following up the goods as the declaration suggests, for Neser has not the *dominium*, either because he never was the seller—or if he was yet he allowed credit. As to giving credit, only a short time is necessary to quash the presumption of cash, viz., ten days: *Sadie* v. *Standard Bank* (7 J., 87). The rights of the seller must be asserted in a reasonable time. But the case as to the follow-up is not (except by suggestion in the first part of the dictum) the case of the plaintiff. his case is the agreement with Innes and Bosman. Could Bosman have sued Innes? Innes undertakes to advance on the 19th June, and at bank rate of interest till the 30th August. This clearly shows his intention—that he was going to advance it to Bosman and send it as Bosman's agent. The fact of crediting Bosman with it in the books would not entitle Bosman to sue. It is merely necessary in order to keep the books correctly and up to date. To entitle Bosman to sue Innes, he must prove custom, failing contract,

On the facts, what legal claim has Neser against Innes? Plaintiff must choose between the alternatives thrown out by him, he must be tied down to one or the other. The declaration does not show clearly—but it must be delegation or cession—and plaintiff seems to rely on former. For delegation the essentials are that A. owes B. and B. owes C., and by consent of A. A. is substituted as debtor to C. Delegation is a branch of novation, it is never assumed—and it must be clearly proved, and all three parties must consent. Supposing Innes owes Bosman and Bosman owed Neser, without his own consent, Innes cannot be substituted in Bosman's place. Yet Innes indeed claims he never was Bosman's debtor. Clearly there was no delegation. Was there cession? Cession might be effected either orally or in writing—but it must be complete and it must be intended. Cession requires no consent of Innes, but is there a single letter or conversation of Bosman's which cedes any claim against Innes to Neser? There was a conversation in April, but there was no claim (if ever) against Innes before 30th May. Further, has Neser ever released Bo man? There is nothing to show it. Of course if as the Court seems to think at the date of Bosman's insolvency, Neser had a claim either for the goats or for the proceeds, that entirely disposes of the question of delegation. For there is no proof of cession.

Mr. Justice Buchanan: Wasn't Innes in the position of a depositary for Neser?

Mr. Innes: If anything it must be as to Bosman—but the facts show Innes was not a stakeholder; if anything, he was only Bosman's agent. As soon as Bosman told Innes that he was going insolvent, Innes refused to carry out the agreement to advance to Neser (as Bosman's agent), as it would have been an act of undue preference, and Innes would have been a party to it. Innes took up a *bona-fide* position. Suppose Innes is said to have been bound by a *constitutum possessorium*. It cannot apply, the Court is always averse to it, and strong proof is required that the stakeholder intended to act as agent for both parties. But the stakeholder swears he never intended to act as Neser's agent. Had cession of action been alleged in the pleadings, we would have made the alternative plea that we had not to pay Bosman till 30th August, and even declined to pay Neser till 30th August: *McGregor's Trustee* v. *Silberbauer* (9 Juta, 36). The very person alleged to have ceded (Bosman) is not called in this case.

Mr. Searle: Correspondence shows clearly Neser never abandoned his rights under the conditions of sale. Compare case of *Horwood's Trustees* v. *Trentyman & Co.* (12 Juta, 96.)

C.A.V.

Postea (Aug. 25th.)

The Acting Chief Justice said: The main facts of this case are not in dispute, most of the communications between the parties being in writing. On the 21st March last plaintiff, an auctioneer, held a sale of stock at Graaff-Reinet, the terms being cash, the auctioneer, however, reserving the right to give three months' credit on receiving promissory notes with endorsers to his satisfaction, with bank rate of discount added. At this sale one H. S. Bosman purchased 735 Angora goats for £514 12s. 11d., and removed the same without settling for them. Bosman, who resided in the district of Murraysburg, told plaintiff after the sale that he would send an endorsed bill when he got home. Not hearing from Bosman, plaintiff wrote on the 26th, calling upon him, unless he made an immediate settlement, to deliver all the goats at Graaff-Reinet without delay, as plaintiff did not consider them Bosman's property until paid for. This crossed a letter from Bosman, also dated the 26th, which enclosed an unendorsed promissory note. Plaintiff wrote at once, on the 31st, returning the note, again demanding a settlement, and warning Bosman not to shear the goats or sell them before they were paid for. On the 7th April defendant, who was an auctioneer and general agent carrying on business at Murraysburg, wrote informing plaintiff that Bosman had authorised him to sell 400 goats, and that out of the proceeds he expected to pay off at least £200. The same day that plaintiff received this letter Bosman himself went to Graaff-Reinet and gave plaintiff a paper signed by one Watermeyer, undertaking to pay £100 by the 21st June, which was three months from the date of Bosman's purchase. This guarantee, which plaintiff accepted, had been given by Watermeyer as he was to receive, or had received from Bosman, the clip of hair shorn off the goats. At Bosman's request plaintiff consented to allow defendant to sell the goats provided the proceeds were remitted to plaintiff. Bosman thereupon signed an order on defendant in favour of plaintiff, which order plaintiff sent to defendant same day. On the 14th April, not having heard further, plaintiff wrote asking defendant to remit. Defendant replied on the 18th that he had not sold the goats, but that he had a very good guarantee for £200. It appeared that as no satisfactory offer had been made at the sale, Bosman had sold the 400 goats out of hand to one Pienaar,

who guaranteed to pay, and ultimately did pay £200 to plaintiff, also by the 21st June. On the 28th April plaintiff wrote again asking Bosman for a promissory note with a substantial endorser for the balance after deducting the £300 guaranteed, viz., £214 12s. 11d., and £10 5s. 10d., three months' discount to 21st June, offering to give an additional two months' credit on an approved bill. No reply was sent, but during May Bosman sold to one C. P. Bosman certain of the goats for £95 9s. 6d. C. P. Bosman asked defendant to advance him the money to pay H. S. Bosman, which defendant agreed to do. H. S. Bosman drew £45 9s. 6d. of this amount from defendant, leaving the balance of £50 with him to be sent to plaintiff. On the 30th May, while defendant was holding an auction, Bosman brought another lot of the goats, which defendant sold for £112 5s. 2d. Defendant gave at his own risk the purchasers of these goats three months' credit. Defendant has stated in evidence that on the 5th June he had a conversation with Bosman, who requested him to send the proceeds of the sale of these goats to plaintiff by the 21st, but that defendant pointed out that the 21st was a Sunday, and agreed to send the money on the 19th. This conversation must have taken place on an earlier date, for we find Bosman asking defendant by letter of June 1 how much would still remain due after defendant had sent on the 19th the proceeds of the sale and the £50 of C. P. Bosman's that had been left with defendant. On the same day Bosman wrote informing plaintiff that he had written to defendant asking how much money he had, and promising as soon as he knew the amount of the balance to send plaintiff a promissory note, as he hoped plaintiff would give him a little longer credit for the small sum still unpaid. These letters are confused in terms and somewhat ungrammatical, but they are to the effect stated. Defendant replied to Bosman on June 2 that auction dues and commission would have to be deducted from the amount realised at the sale, and that if he was to send the money to plaintiff a further charge of £1 11s. 6d. for discount would also come off, leaving a balance of £102 16s. 6d., which, together with the £50 from C. P. Bosman, in all £152 16s. 6d. Defendant wrote: "I shall send to Mr. Neser." Defendant deposes that when Bosman called on June 5 he asked for a statement of account between them. In conversation Bosman said he had lost money on the transaction, whereupon defendant agreed to forego the charge of £1 11s. 6d. discount; and he made out and gave to Bosman a statement as follows: By cash received of C. P. Bosman, £95 9s. 6d.; by proceeds of sale, £112 5s. 2d.; total, £207 14s. 8d. To cash, £45 9s. 6d.; to Government and auctioneer's charges, £7 17s. 2d.; to Bank Exchange on cheque, C. A. Neser, 3s. 9d.; to cheque, C. A. Nesser, £154 4s. 3d.; total, £2 7 14s. 8d.—Murraysburg, June 5, 1896. Alex. Innes." On the same day defendant wrote to plaintiff as follows: "I have to advise you that I shall forward you by the 19th inst. £154 4s. 3d. for account of Mr. H. S. Bosman." Plaintiff was away from home, but on his return he wrote to defendant on the 18th June: "I expect the amount of £154 4s. 3d. as per your advice on Saturday." Meanwhile, on the 16th June Bosman had called upon defendant, and asked if the money had been sent to plaintiff. Defendant replied he would remit it on the 19th. Bosman then told defendant that he was in difficulties and would have to surrender his estate. Defendant thereupon said it would not be fair to defendant's other creditors to send the money to plaintiff. Bosman asked whether defendant could not deposit the money to plaintiff's credit in the bank, and plaintiff said he would have done so had Bosman not told him of his circumstances, but now he could not do so. Bosman said if that was the case defendant was to keep the money. Defendant and Bosman talked over the condition of his estate, and on the 18th, at Bosman's farm, defendant prepared the schedules for surrender, which Bosman then signed. On the 17th Bosman wrote an exculpatory letter to plaintiff, in which Bosman said he wanted the money sent, but that defendant said it could not be done. On the 18th defendant wrote a letter to himself, which Bosman signed, requesting defendant to keep the money as part of Bosman's estate. On the 18th defendant telegraphed, and on the 19th wrote to plaintiff, saying that Bosman had surrendered his estate, and that under the circumstances he was not justified in forwarding the money to plaintiff. As a fact, the notice of intention to surrender was not published till the 30th June, and the order of sequestration was only granted on the 26th July. Plaintiff, in reply, insisted that defendant held the money on plaintiff's account and not for Bosman, and offered to indemnify defendant if he paid it over. This offer defendant refused, and still retains the money, though he "Mr. H. S. Bosman, in account with A. Innes.—asserts he has no interest in the matter one way or other. The defendant has since been elected trustee in Bosman's estate, though letters of confirmation have not yet been issued. The defendant, however, is not sued in his official capacity, and defends the action on the ground

that he is bound to account to the estate and not to the plaintiff. It might have been better had the estate been represented, but neither party has taken steps to have this done. The allegations of the declaration are incomplete, but taken together with the additional facts set forth in defendant's plea, the whole pleadings sufficiently disclose the issue now to be decided. Dealing with the parties to this suit, it appears to me that the defendant's position would best be described as that of a depositary or bailee. On the 5th June, after he had in effect discounted the vendue roll, he was simply the custodian of the money. At the request of Bosman he undertook to hold the amount in his hands at the disposal of the plaintiff. The account then furnished by him and accepted by Bosman was so framed as to show he was discharged from further liability to Bosman. The defendant agreed to hold for the plaintiff, and himself wrote that he would remit to him the amount shown in the account, and this offer the plaintiff accepted. There was no actual sequestration of Bosman's estate till after defendant had refused to pay over the money. Even if defendant be regarded as Bosman's debtor there was a distinct assignment by Bosman to plaintiff of the right to the money. The plaintiff was informed of and accepted this assignment, and though perhaps mere notice to the defendant might have been sufficient to establish the rights of the cessionary, the defendant removed all doubt on the point by expressly acquiescing in the arrangement. Nothing whatever remained to be done by Bosman to transfer the property in the money. No great stress was placed on Bosman's subsequent request to defendant not to remit. It is not necessary to discuss the question whether or not Bosman could then validly make such a request, for it is clear that Bosman's desire to the end was that plaintiff should receive the amount, and it was defendant's representations, not Bosman's wish, that led to the signing of the letter of the 18th June, which defendant stated he took to protect himself. It was argued, incidentally, that if the remittance had been made, the transaction could have been set aside as an undue preference, as plaintiff had by that time given Bosman credit for the goats. To this it was answered that there could not have been an undue preference, as Bosman was but complying with the condition on which he secured permission to sell the goats, and that as plaintiff was a creditor only in respect of this very transaction the estate was bound by the conditions, and could not claim to be enriched both with the property and with its price; and, further, that the transaction would have been covered by the 86th section of the Insolvent Ordinance. As the decision of the present suit cannot bind the trustee or creditors, it is undesirable to express an opinion as to what might have been the result of an action of undue preference. Issues other than those now raised would, in such a case, have called for determination. Without putting the fact of Bosman's subsequent insolvency entirely out of consideration, yet as between plaintiff and defendant I fail to see any good defence to this action. If the creditors should desire to test the plaintiff's right to keep the money, they may still do so. Several of the English cases on equitable assignment which were cited are in favour of the plaintiff, and in *Wright & Co.* v. *The Colonial Government* it was pointed out that there was no substantial difference in the principles of equity and of our law. But I do not think it necessary to go beyond the case of *Mills & Sons* v. *Benjamin's Trustees* (6 Buch. S.C. Rep., 119), where the Roman-Dutch law was discussed at length, and stated with great precision in the judgment of the learned Chief Justice. Though in that case the defendants succeeded on the special state of facts, the principles there enunciated appear to me to establish the plaintiff's right to succeed here. In my opinion the judgment of the Court ought therefore to be for the plaintiff for the amount claimed, with costs.

Mr. Justice Maasdorp said: There is certainly some difficulty in arriving at a clear understanding of the exact nature of the dealings of the parties interested in this case. Their intention must be gathered from several conversations which took place between them, and from a correspondence embracing a number of letters. Upon going through the evidence the question suggests itself whether the relationship established between Bosman and defendant was merely that of principal and agent, with authority to the defendant to pay certain moneys to plaintiff on account of Bosman; or whether there is proof of an out and out cession by Bosman to the plaintiff of a fund belonging to him in the hand of the defendant In the former case it would follow that in the event of the sequestration of Bosman's estate before the authority was executed by his agent the agency would be cancelled by the operation of law, and the moneys in defendant's possession will belong to the insolvent estate. If on the other hand, a cession of the debt had taken place before insolvency, the right became vested in the plaintiff, and the trustee in the estate could have no claim to it. In some of the letters which passed between the

parties terms and expressions are used which, it might be contended, indicate no more than the creation of an agency in the defendant for the payment of a debt to plaintiff on account of Bosman. But I think the true intention of the parties must be gathered from the whole of the dealings, conversations, and correspondence which took place between them. If there was a cession or assignment of a right to Neser it certainly cannot be said to be expressed in set phrases in a single document, and I can quite appreciate the consequent difficulty which the pleader obviously laboured under in drawing his declaration. The contract between the parties was in my opinion concluded in June, and yet clearly to discover their intention it is necessary to refer back to what took place between them in April. The relations established between them when on the 9th of April Bosman by letter authorised the defendant to pay over to the plaintiff the net proceeds of the sale of certain goats to be sold by the defendant have, as indicating the intention of the parties, a very strong bearing upon the agreement entered into on the 5th of June. Before the 5th of June, apparently, some arrangement must have been made between Bosman and defendant with reference to a remittance of money to be made by Innes to Neser on the 19th of June, because we find on the 1st of June Bosman writing to the defendant, "Please be kind enough to tell me how much will remain over on those goats when Mr. Innes sends the money to Neser on the 19th of this month," and he includes in this money the £50 advanced by Innes on account of C. Bosman, which, he says, he "left with Mr. Innes." On the same day Bosman wrote to Neser that he had communicated with Innes, and would send Neser a promissory note for what might still remain due, after the moneys in Innes's hand had been accounted for to Neser, hoping to get a longer credit for such balance. I gather from this that it was Bosman's intention all along, although he does not express himself very happily, to give both plaintiff and defendant to understand that as to the moneys in Innes's hands they would be paid direct by Innes to Neser, while he would settle the balance by means of a promissory note. It also appears that Neser expected the debt to be settled in that way. But up to this time no final agreement was concluded. On the 2nd of June Innes wrote to Bosman giving him a statement of account between them, and informing him that if he was to send the money to Neser he would have £152 16s. 6d. to send. A few days after this Bosman had an interview with the defendant, and what then passed between them, after it was communicated to the plaintiff and consented to by him, constituted the finally concluded agreement between the parties. In my opinion it amounted to a cession by Bosman of funds in defendant's hands, which defendant undertook to pay to the plaintiff, and which undertaking was accepted by the plaintiff. Reference to the account made out on the 5th of June by the defendant, shows that Bosman was then debited with the amount which Innes undertook to pay to plaintiff, and it was in the first instance stipulated that for this undertaking to pay on the 19th of June, Bosman should by way of discount pay Innes a certain sum, which was, however, subsequently abandoned. Bosman himself has not been called as a witness in the case, but his view of the transaction of the 5th of June may be gathered from a letter written by him to Neser (No. 21) after the 18th of June. He writes: "Now, to come to the point about the £154 4s. 3d. On the 5th June the above amount was given to Mr. Innes to remit to you." On the 5th of June defendant wrote to plaintiff: "I have to advise you that I shall forward you by the 19th inst. £154 4s. 3d. for account of Bosman." Here again it might be argued that the words "for account of Bosman" go to show that defendant was acting merely as Bosman's agent. But it seems to me when taken with the rest of the evidence simply to be intended to locate the payment, and to appropriate it to the particular transaction in question. On the 18th of June the plaintiff wrote to the defendant saying "I expect the amount, £154 4s. 5d., as per your advice." I am therefore of opinion that the cession was complete, and the claim vested in the plaintiff before the surrender of Bosman's estate. In my opinion judgment should be given for plaintiff for the amount claimed with costs.

Mr. Justice Solomon also gave judgment. The conclusions to which he came to were as follows: 1. That the plaintiff had not made out the case set forth in his declaration, for that it had not been proved that the defendant had received any specific sum of money, to be held by him for and on behalf of the plaintiff and to be remitted to the plaintiff, and consequently, that if the plaintiff was to be strictly tied down to the terms of the declaration, his cause had failed. 2. That the contention, that the sale of the goats to Bosman on the 21st March, 1896, was a sale for cash, and that consequently the price not having been paid the goats had not become the property of Bosman, had also failed. For that whatever might have been the original conditions of sale, it was quite clear that credit had subsequently been given by the plaintiff to Bosman, and that thereupon the goats had

become the property of Bosman. 3. That there had been no substitution of the defendant as debtor to the plaintiff, in place of Bosman, in respect of this debt of £154. That such a delegation would have required a common agreement between the plaintiff, the defendant and Bosman, under which Bosman would have been released from this debt, and the defendant would have been substituted in his place, whereas the evidence showed that plaintiff never regarded Bosman as released from his liability. That although in law it might be possible for the parties to have agreed that defendant should become liable for the debt, leaving to plaintiff a recourse over against Bosman, such a contract would be a very special one and would require to be clearly proved, but that there was no evidence in this case to prove that any such agreement had been concluded. 4. That in his opinion the evidence showed that there had been a cession by Bosman to plaintiff of the right to this debt of £154, owing to him by defendant. That although there was no one letter in which Bosman in so many words ceded to plaintiff all his rights, title, and interest in this debt, yet the Court should regard the substance and not the mere form of the transaction, and that if it were clear that a cession was intended the Court would give effect to such intention. That after reviewing the evidence in the case and, more particularly the two letters written by Bosman to the plaintiff and to the defendant on the 1st June, he came to the conclusion that Bosman had intended to cede this debt to the plaintiff. 5. That the question, thereupon, still remained, whether upon the pleadings as they stood judgment could be given in favour of the plaintiff, or whether it would not be necessary for the declaration to be amended before such a judgment could be given. As the other judges, however, did not think it necessary that the pleadings should be amended, he concurred that judgment should be entered for the plaintiff.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

STEVENSON V. STEVENSON. } 1896. } Aug. 24th.

This was an application for divorce by reason of the alleged adultery of the defendant with a woman residing in St. Philip's-street, Cape Town.

Mr. Graham for the plaintiff, defendant in default.

Reginald Douglas Herold Barry, a clerk in charge of the marriage register at the Colonial Office, produced the register, showing that the parties were married on the 9th of May, 1892.

Florence Stevenson, the plaintiff, said the marriage took place on May 9, 1892, at the Free Protestant Church, Cape Town. After the marriage they resided at Observatory-road for about a year. Defendant was a builder. She recognised the photograph of the defendant produced. There was one surviving child of the marriage, a girl, aged one year and ten months. After residing at Observatory-road the parties resided at Johannesburg for about six months, Bloemfontein one year and a half, East London for two or three weeks in March last. The first child, now dead, was born at Observatory-road, and the surviving child at East London. In April of this year witness came down to Cape Town, and resided with her father. Three weeks later her husband came down to Cape Town, but did not live with her. Before they left East London they had no disagreement of a serious nature; in fact they parted good friends. She expected him to join her. While defendant was in Cape Town he lived at a boarding-house in the Gardens. While witness was staying at her father's she suspected her husband of infidelity, by reason of a card which slipped from his pocket. She had not the card in her possession. Witness called at the address and placed the matter in the hands of the detectives. She claimed the custody of the surviving child. The parties were married by ante-nuptial contract. Defendant had no money, to her knowledge.

Thomas Jefferson, a private detective, residing in Cape Town, identified a photograph produced as that of the defendant. On the evening of July last he followed defendant from the corner of Darling and Adderley-streets on a tramcar, at about a quarter past seven. Two other men were with himself, near at hand. Defendant alighted directly opposite the Transvaal Hotel, Sir Lowry-road. Witness got off at the same

time. Defendant went up Rutgers-street, and entered a brothel. It was a bright, moonlight night. Opposite the house was a vacant stand, and from this standpoint witness watched the house. Defendant remained in the house about twenty minutes, and then walked up and down the road for about a quarter of an hour, and entered the house again. Witness entered the house, and discovered defendant in a room with a lady now in court. Her name was Miss Augusta Nohlan. On the next day witness met defendant at the Café Royal, an acquaintance being also present. Defendant said he had been on the previous night to St. Philip's-street to see this lady. Witness asked defendant where this place was, and defendant gave the address of the house watched by witness, reminding witness he had been there himself. Defendant admitted the adultery in witness's hearing.

Augusta Nohlan identified defendant's photograph, and proved the adultery.

The Court granted a decree of divorce, plaintiff to have the custody of the surviving minor child of the marriage, defendant to have access to the child at all reasonable times and places, and to pay the costs of the application.

REHABILITATIONS.

Mr. Jones applied for the rehabilitation of Philip Rudolph Theunissen.

The Court refused the application, and gave leave for applicant to apply again within three months.

On the application of Mr. Buchanan, Gerhardus Nicolaas Michau was rehabilitated.

On the application of Mr. Graham, Matthew John van Ryssen was rehabilitated.

On the application of Mr. Benjamin, Casper Johannes Schoeman was rehabilitated.

On the application of Mr. Benjamin, J. A. Schoeman was rehabilitated.

GENERAL MOTIONS.

THE PETITION OF SIRVUNDLA.

Mr. Castens applied for authority to the official liquidator of the Kaffrarian Colonial Bank to pay out to petitioner the amount due to him on a certain deposit receipt, granted in 1891, notwithstanding that the period fixed by the Court for filing proofs of claims expired in February of the present year.

Granted.

IN THE MATTER OF THE PAARL BANK.

Mr. Tredgold presented to the Court the fourth and final report of the official liquidators.

Confirmed.

FAKTOR V. DE WET.

Mr. Molteno moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against the respondent for the recovery of an amount due for services rendered and material supplied.

Granted.

THE PETITION OF HERBERT M. SMITH.

Mr. Close applied for the attachment *ad fundandam jurisdictionem* of this Court, of certain lot of ground, being half of erf C 3 in the village of Oudtshoorn, in an action about to be instituted by petitioner against Henry Morrison, the owner of the said land, for the recovery of an amount due on a mortgage bond.

The Court granted the order, with leave to sue by edictal citation, to be made returnable on the 17th of October, personal service if possible failing which, one publication in the Johannesburg "Star" and the "Cape Times."

IN THE ESTATE OF THE LATE IZAAK A. J. DE VILLIERS AND SURVIVING WIDOW.

Mr. Graham applied for an order relieving the widow of her trust as executrix testamentary, in order that an executor dative may be chosen, against whom she may institute an action for her half-share of the said estate, as she is unable to carry out the provisions of the will, which required the whole estate to be realised and the proceeds to be paid into the Guardians' Fund.

Granted.

IN THE PARTNERSHIP BUSINESS OF EVAN AND CO.

Mr. Molteno moved for the appointment of a receiver to liquidate the affairs of the said partnership and realise the assets by reason that Evan Mordecai, one of such partners, has disappeared, and is believed to have left the Colony.

The Court held that it was unnecessary to make an order.

IN THE MATTER OF THE MARRIAGE SETTLEMENT OF CECILIA F. SHEARD.

Mr. Jones applied for authority to the trustee of the said settlement to surrender

certain life policy effected on the life of Thomas S. Sheard with the Mutual Company, and vested in the said trustee, and to apply the proceeds towards the maintenance and support of the wife and children of the said Sheard, who disappeared two years ago and has not since been heard of.

Granted.

GORDON V. BERLINER. { 1896. Aug. 24th.

Plaintiff - *Incola— Peregrinus*— Domicile — Permanent residence—Costs—Security — Resident Magistrate's jurisdiction—Procedure.

G. *sued* B. *before the Resident Magistrate, in an action for slander.* B. *applied that* G. *be ordered to give security for costs on the ground that* B. *was not an* incola *but a* peregrinus *intending to leave the Colony.*

The Resident Magistrate found that G. *did so intend to leave and ordered security to be given.*

Held on appeal *that the Resident Magistrate was justified under the circumstances of the case in making the order.*

This was an action for slander, in which the plaintiff complained that on the 27th day of April, 1896, at Barkly Pass, where the plaintiff was in the service of the defendant, the said defendant did falsely and maliciously speak and publish of, and concerning the said plaintiff, while speaking to and addressing him the following false and slanderous words:- (1) I do not want you to go behind my counter any more. You stole money from me as you have more money in the bank than you ought to have, and if it goes on like that you will ruin me. (2) A thief is not entitled to a month's notice.

Before the Resident Magistrate the defendant's agent applied that plaintiff might be ordered to give security for defendant's costs before proceeding with this case, in-as-much as plaintiff is not an *incola* of this colony, but a *peregrinus* about to take his departure for the South African Republic.

The defendant stated that: "In reply to a letter of demand from plaintiff's agent, I sent a reply, notifying I would apply for security by plaintiff for costs. I was informed by Corporal Allison, of the Cape Police, that plaintiff is leaving for Johannesburg directly after the case is over. It is common report. Plaintiff has not told me."

Another witness deposed: "I have heard from several that plaintiff is leaving, but beyond hearing from Allison and others I don't know of my own knowledge.

"On 18th May last I met plaintiff, he was then coming into town to attend court in this case This was at Rozenberg's at Johnson's Leap. He said; Good-bye, as I don't expect I shall see you again, as I am leaving for Johannesburg as soon as the case is over. He referred to this present case."

The plaintiff's agent asked that the application for security for costs be set aside, on the ground that previous to the case being heard in this Court, there was no application requiring defendant to show cause why he shall not be ordered to give such security.

The Court, however, considered the application sufficient in the absence of any other form in the Magistrate's Court procedure.

Gordon, the plaintiff, then gave evidence: I am the plaintiff in this case. About 20th May last, I saw Corporal Allison, and I told him I was leaving for Johannesburg. It was my intention to leave the Colony immediately the case was over if I did not get work.

The application was granted: security to be given on or before the 9th April, to be approved of by the Court.

Plaintiff's agent stated that plaintiff was unable to find security as the Court had not fixed the amount of security required, and secondly, plaintiff having noted an appeal against the judgment of the Court, requests that the matter stand over, pending the result of appeal. The Resident Magistrate fixed the amount of security to be given at £12.

The following were the Resident Magistrate's reasons for the judgment in terms of section 7, Act No. 43 of 1885:

In this case defendant applied that plaintiff be ordered to give security for defendant's costs before proceeding with this case inasmuch as plaintiff is not an *incola* of this colony, but a *peregrinus* about to take his departure for the South African Republic.

At first I had some doubt as to whether I could entertain the application, but that was soon dispelled on reference to Supreme Court decisions.

On hearing the evidence of both sides, I was very strongly of opinion that Gordon's intention was to leave immediately after the action had been heard, and should the decision have been adverse to him, the defendant (Berliner) would have been without redress, for Gordon would have proceeded to the South African Republic beyond the jurisdiction of the Court. I don't place much reliance in his statement that he

has obtained work with Ginsburg, for although he had the opportunity of calling Ginsburg he did not avail himself of it, and there is the fact that he not only mentioned to the corporal of Cape Police his intention of leaving but actually sent all his worldly possessions to Aliwal *en route* for Johannesburg, and it struck me that Berliner, who is carrying on a considerable business, had everything to lose and nothing to gain had Gordon decamped. Gordon belongs to the class of foreign Jews who come to this country in light marching order, and I felt in duty bound to support the application, and am confident that justice has been met.

Mr. Molteno for the appellant. Mr. Innes, Q.C., for the respondent.

[The warrant for respondent's counsel to appear had not reached town (though on its way) but appellant's counsel consented to the appearance.]

Mr. Molteno: The point of appeal is the order for security for costs. Plaintiff is a naturalised British subject in service in this Colony—and he has no intention of leaving the colony. It is not the case of a non-resident coming into the Colony from elsewhere; he is resident domiciled here, became a British subject naturalised in England. The dispute took place in the Colony. *Schunke* v. *Taylor & Symonds* (8 Juta, 103); *Lumsden* v. *Kaffrarian Bank* (3 Juta, 366), are probably the cases relied on by the Resident Magistrate but they were cases of non-residents having no property here.

Mr. Innes: An *incola* is one domiciled here. As *Brissonius* defines it naturalisation does not affect the question of costs at all, and residence only if amounting to domicile. A man must have a domicile of business. *Witham* v. *Venables* (1 Menz., 291) laid down the position of an *incola*. It would be a question of degree in each case, whether a man has acquired a *quasi* domicile—a business domicile. *Voet* (2, 8, 1) gives domicile as the test. It is not a question of jurisdiction. The plaintiff *can* sue—the question is only, must he give security for costs? In *Steyler* v. *Tonkin* (Buch. 76, p 241) security for costs was ordered to be given though the plaintiff was domiciled—but had left for Transvaal after the case had begun. The question is one of a mere matter of fact as to the plaintiff's desertion—and the intention is the thing. It is true apparently that no Resident Magistrate has ever made an order of this kind. **Lange* v. *Claassen* (3 Sheil, 371) was decided on the question of permanent residence in the Colony.

*10 Juta, 243.

The Acting Chief Justice said that in this case the Court must take the facts as found by the Magistrate. The Magistrate, after hearing the evidence, considered it proved that Gordon, a foreigner, had come to this colony without the intention of permanently residing here, and intended as soon as the action was over to leave the Colony for the Transvaal. Under these circumstances the Magistrate found that he was not an *incola*. It was very difficult to define find what was intended by the word *incola*, but the authorities cited by Mr. Innes showed that a person who was a foreigner, and who was in the Colony for a temporary purpose, and did not intend permanently to reside within the jurisdiction of the Court, must, before he could sue in court, give security. Under the circumstances found in this case the Magistrate was justified in calling upon the plaintiff to find security. The Magistrate had jurisdiction to do this. The appeal would be dismissed with costs.

[Appellant's Attorneys, Messrs. Sauer & Standen; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CONROY v. BEZUIDENHOUT. { 1896. Aug. 24th.

Doctors—Medicines—Compounding—Sale—Licence—Act 34 of 1891, section 60.

C., *who was licensed as a medical practitioner but not as a chemist and druggist, attended* B. *in his medical capacity.*

C. *had a special arrangement with a duly licensed chemist by which he was to dispense* C.'s *prescriptions and debit* C. *with the amounts due.*

C. *claimed £4 18s. from* B. *on an account which included charges for medicines supplied.*

The Resident Magistrate gave absolution from the instance with costs to B., *on the ground that* C. *was bound to take out an annual licence as a doctor, and that he had charged for the medicines as if dispensed by himself, when, as a fact, they had been purchased by him.*

The Court on appeal *gave judgment for the charges as medical practitioner and absolution from the instance on the charges for medicines supplied.*

This was an appeal from a decision in an action brought before the Resident Magistrate, Fort Beaufort, to recover £4 18s. for professional

attendance and medicines supplied by the plaintiff to the defendant, at the said defendant's special instance and request, between the 16th day of June, 1894, and the 6th day of June, 1895, as per account annexed, which the said defendant refused to pay.

The defendant in person denied owing the amount claimed in the account for the months of October to December, 1894, amounting to the sum of £2 6s. 6d. but admitted £2 11s. 6d., and pleaded also that the plaintiff not being licensed to dispense and sell medicines he could not recover the amount claimed.

John Conroy, deposed: I am a resident of Fort Beaufort, and my occupation is a medical practitioner. I produce the Medical and Pharmacy Register, and I appear on the list as a duly licensed practitioner. (Page 55.) I know the defendant and attended him professionally. I produce my ledger, showing the debit entries against him. On June 16, 1894, I find the following items against him:

Advice 2s. 6d., medicine 2s. 6d., powder 1s. 6d.—Total	£0	6	6
The next item is on July 31, medicine	0	3	0
Aug. 4. Two items for medicine ...	0	3	0
18. A visit 3s.; 20, medicine 4s. 6d.	0	7	6
Sep. 25. Medicine 3s.; 26, visits 2s. 6d.	0	5	6
27. Visits 2s. 6d., medicine 4s.;			
28, 2 visits 5s.	0	11	6
29. Medicine 4s.; 30, visits 2s. 6d.	0	6	6
Making a total of	£4	18	0

These entries are all correct, the visits were paid and the medicine supplied. The medicines were dispensed at McJamett's dispensary. These visits and the attendance were principally on the defendant's family; he always received the medicines from McJamett's. I always directed him to go there with the prescription. I generally wrote the prescription at McJamett's, and he went there and got the medicines. The account was rendered to him several times, and he has never questioned it. In addition to this he saw me several days ago, and he expressed himself as perfectly satisfied with the account. I also told him there were visits paid and not charged for, and he said he remembered the circumstances.

I cannot remember each individual to whom I gave the medicines, but they were given to members of defendant's family; I cannot tell from the items for whom each prescription was given. I do not hold a licence to dispense medicines.

Stewart Murdock McKenzie, deposes: I am a chemist and druggist residing in Fort Beaufort, and manager of McJamett's business. I compound prescriptions for Dr. Conroy. I have compared the items charged for by Dr. Conroy, for medicines with my book (prescription) and found that all the medicines were compounded by me. I do not know defendant's wife. I am aware that Dr. Conroy attended defendant's wife in a case of childbirth, and that the Mrs. Bezuidenhout he attended then is the same one who received some of these medicines. I went by the doctor's prescription with regard to his attending to defendant's wife. When Dr. Conroy came here I made a special arrangement to dispense his medicines for him and I charge them to him.

The following were the Resident Magistrate's reasons:

The defendant, who appeared in person, pleaded non-liability for certain items; and secondly, that the plaintiff not being a licensed practitioner, was not entitled to recover (this assertion as regards the licence was admitted). In the account put in the plaintiff charged for medicines and attendance, but as regards the medicines he omitted to state that they had been purchased and paid for by himself, and that it was for money laid out; he was therefore clearly not entitled to recover on these charges:—Moreover the plaintiff charged for medicine as if he dispensed by himself. We have it on evidence that there is a business agreement between himself and the chemist (presumably profitable to both); if such is the case, I submit he cannot shelter himself under a chemist's licence, and derive profit therefrom.

On the charge for medical attendance, plaintiff would have been entitled to succeed prior to the passing of the Medical and Pharmacy Act of 1891, but this Act provides in the 60th section: That no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation as a medical practitioner or dentist, or commonly performed only by a medical practitioner or dentist, or for any medicine which he shall have prescribed or supplied, unless he shall prove upon the trial that he is licensed under this Act.

And further by the 22nd section: That every medical practitioner shall be entitled to practise as an accoucheur, and may compound and dispense medicines prescribed by himself, or any other medical practitioner with whom he is in partnership upon payment of the annual licence fee required by law to be paid by the chemist and druggist (see page 13. Medical and Pharmacy Register). From this it would seem that the two sections must be read together in confirmation with the Stamp Act, No. 20 of 1884, and that not only must a

medical man be registered to practise in the Colony, but that he must also be provided with an annual licence. Moreover there, is a special provision in the 22nd section, that to attend in midwifery cases the medical man must be provided with a medical licence. In this case we have Mr. McKenzie's evidence that a portion of the attendance charged for was in connection with a confinement. Now it is perfectly well known that almost every practitioner attends midwifery cases, that they are inseparable from his practice, and it could never have been the intention of the Legislature to distinguish between the various classes of cases or ailments to be treated by the medical profession. If this view is correct, medical men who are general practitioners and attend confinements, are not entitled to practise and sell medicines without first providing themselves with a medical practitioner's licence, and I submit that the word "licence" mentioned in the 60th section must be the annual licence fee referred to in the 22nd section.

The plaintiff, in his evidence, states that he was licensed to practise (*vide* list in Medical Pharmacy Register, commencing page 51), but this list is not part of the Act, and offers no guarantee that any annual licence has been taken out. I might add that the 17th section does not in any way exclude practitioners from the provisions of the 22nd and the 60th sections.

Under the circumstances the judgment was absolution from the instance with costs of suit for defendant.

Against this judgment appeal was now made.

Mr. Molteno for the appellant.

After argument,

The Acting Chief Justice said: The Medical and Pharmacy Act of 1891, section 60, states that "no person shall be entitled to recover any charge made for medical or surgical duties or attendance," and so on, "or for any medicine which he shall have prescribed or supplied, unless he shall prove that he is licensed under this Act." The plaintiff in this case was licensed under this Act as a medical practitioner, and was therefore entitled to recover the amount charged for medical attendance and for the visits which he paid to the defendant. The Magistrate however, relying upon the 22nd section of the Act, which provides that "every medical practitioner shall be entitled to practise as an *accoucheur*, and may compound or dispense medicines prescribed by himself or any other medical practitioner upon payment of the annual licence required by law to be paid by a chemist and druggist," held that the plaintiff must take out an annual chemist and druggist's licence before he was entitled to practise as an accoucheur. The Magistrate's reading of this section is I think incorrect. The true meaning of this section is that any duly licensed medical practitioner may practise as an accoucheur, but that if he compounds or dispenses his own medicines he shall not be entitled to sue for those medicines unless he also takes out the annual licence required by a druggist. In this case the plaintiff, Dr. Conroy, did not himself compound the medicines, but got them compounded through a chemist who had taken out an annual licence. Section 60 of the Act goes on to say that "any such medicines prescribed or *supplied* may be sued for by any person licensed as a druggist." These medicines are charged for as having been supplied by Dr. Conroy, who does not hold a druggist's licence, consequently he is not entitled to sue for them. To that extent the Magistrate's contention is well founded, but the Magistrate erred in disallowing the plaintiff's charges for attending a confinement. The correct judgment of the Court below should have been for the plaintiff for the amount claimed for the medical attendance with costs; and as the plaintiff did not prove that he held a druggist's licence the Magistrate should have given absolution from the instance as to the further charges for medicine. The plaintiff has in part succeeded in his appeal, and will consequently be allowed his costs.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

In re MINORS LEACH. } 1896. Aug. 24th.

Father — Guardian substituted — Tutor Dative.

L., *who became involved in financial difficulties, went to the Transvaal, leaving behind him in the Colony his four children. In the Transvaal he married again and he settled down there permanently.*

The four children were minors entitled to certain properties in this Colony which had belonged to their mother under an ante-nuptial contract: the rents to be paid to their guardian during minority

Before leaving the Colony L. *nominated* B. *to be the tutor of the minors, and thereafter practically contributed nothing to their support.*

The Court ordered *the confirmation of this appointment.*

This was an application for the confirmation of the appointment of John W. Bell as tutor dative to the said minors, to enable him to recover certain moneys due to them, their father having taken up his residence in Johannesburg, and authorised the said John W. Bell to be the guardian with full parental powers of the said minors.

Mr. Innes, Q.C., for the applicant.

The applicant's petition set forth:

1. That your petitioner is the trustee duly appointed by the ante-nuptial contract and marriage settlement of Charles William Leach and Agnes Mary Bell, passed before the notary Frederick William Shepstone and witnesses on the fifth day of June 1883, and duly registered in the Deeds Office of this colony on the twenty-sixth day of June, 1883.

2. The said Agnes Mary Leach (born Bell) died on the fifteenth day of November, 1889, leaving four children her surviving, namely, Agnes Mary Leach, Grace Constance Leach, Charles Ronald Leach, and Alfred Douglas Bell Leach, all of whom are minors.

3. The said children are entitled to the trust property mentioned in the said settlement on attaining the age of majority, or marrying (as regards immovable property). And the rents or issues of the said property are payable to the guardian or guardians of such children during minority for their support and education.

4. In or about the month of April, 1893, the firm of Leach Brothers, of which the said Charles William Leach was a partner, got into difficulties, and the estate, including everything belonging to the said Charles William Leach, was assigned or sold. The said Charles William Leach obtained temporary employment for a few months but lost it, and became unable to contribute anything towards the support or education of the said children.

5. In the month of January, 1896, the said Charles William Leach left this colony and proceeded to the Transvaal Republic in search of employment, and is now, as your petitioner is informed and verily believes, married again, and settled permanently in that country.

6. Beyond a small allowance made as your petitioner believes by his father, through his brother John Benjamin Leach, and insufficient to supply necessaries of life for the household, the said Charles William Leach has not since his loss of employment aforesaid contributed towards the support or education of his said children in any way, nor has he done so since his residence in the Transvaal.

7. No letters of confirmation have been granted either to the said Charles William Leach or any one else, as guardian of the said children of Agnes Mary Leach (deceased), as your petitioner was informed and believed after search made in the Master's Office.

8. Shortly before leaving the Colony in January last, the said Charles William Leach nominated your petitioner to be the guardian of the said children, and authorised your petitioner to apply for the appointment of tutor; by deed poll or writing under his hand bearing date the 28th day of December, 1895, hereunto annexed.

9. It has become necessary for your petitioner to take proceedings for the recovery of arrears of rent of property belonging to the said trust estate, and to apply same towards the support and education of the said children, and it is desirable and for the interests of the said children, that your petitioner or some other fit and proper person should be appointed tutor or guardian of the said children during their respective minorities.

Wherefore your petitioner prays that your lordships may be pleased to order the confirmation of the appointment of your petitioner by the aforesaid deed poll, or otherwise to appoint him to be such guardian or tutor, or to make such order in the premises as to your Honourable Court shall seem meet.

Mr. Innes for the applicant refers to *Ex parte Deneke—Re Minors Clarke* (3 Sheil, 395). The present case is a far stronger one than Clarke's. Under the ante-nuptial contract, Bell is only authorised to pay out to the guardian of the minor. Master approves of the applicant as a suitable person to act as tutor dative of these minors.

The Court granted the order confirming the appointment.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

GOWER v. GOWER. } 1896. } Aug. 25th.

This was an action for divorce by reason of the alleged adultery of the defendant with a number of persons.

Mr. Molteno for the plaintiff, defendant in default.

Dr. Charles McGowan Kitching, of Cape Town, said he attended defendant in the Cape Town gaol, where he was detained as a lunatic. Defendant was released on the 11th instant.

Reginald Douglas Barry, a clerk in the Colonial Office, produced the marriage register, which showed that the parties were married on May 13, 1885.

Rebecca Gower, the plaintiff, said her maiden name was Feltham. She recognised the signatures in the register produced as those of defendant and herself. She was married on the 13th of May, 1885, at Beaconsfield, and stayed there two or three years. Defendant's occupation was that of a draper. They left Beaconsfield for Kimberley, where they lived eight years. They did not live happily together, owing to defendant's drunken habits. Then they left for Johannesburg, and while there they separated, witness coming to Cape Town and defendant going to Port Elizabeth. They had lived apart during two years. Witness supported herself by keeping a boarding-house. Defendant had not sent her any money during the two years, nor had he written to her during that time. When they parted defendant agreed to support her. There were three children of the marriage—two girls and one boy. Witness would be able to support her children if a decree were granted. They were married in community of property. The photograph produced was that of defendant, who was now employed at Messrs. Zeederberg & Duncan's. Defendant called upon witness a few days ago, but she refused to see him as she had heard something regarding his conduct.

Mrs. Martha Hobbs, a widow, and sister of the plaintiff, said she kept a boarding-house—Jagersfontein House, Breda-street. Defendant boarded at Jagersfontein House during April, May, and June last. During that time defendant frequently got drunk, and witness remonstrated with him. On one occasion defendant informed witness that he was drinking owing to the fact that he was in trouble. He said, "I have got a young girl in trouble, and her father wants me to marry her. I told him that I cannot do so, as I am a married man. The girl will become a mother in about two months." About eighteen months previously, while witness's husband was alive, defendant boarded at witness's house.

Walter George Cauwell, a boarder at Jagersfontein House, said he had known the defendant for about eighteen months. Witness resided at Jagersfontein House during the time that defendant boarded there. Defendant during the last three months was generally under the influence of drink. Witness spoke to defendant, who acknowledged committing adultery with a nurse at Jagersfontein House. On another occasion defendant informed witness that he had misconducted himself, and that the girl's relatives had called on him at Mr. Garlick's, where defendant was then employed, asking him to marry her. Subsequently defendant informed witness that he had "squared" the matter.

The nurse referred to deposed that defendant had committed adultery with her.

The Court granted a decree of divorce with costs, defendant to forfeit all benefits arising from the community of property; plaintiff to have the custody of the children of the marriage, defendant to be allowed to have access to them at all reasonable times and places.

[Plaintiff's Attorney, P. M. Brink.]

AURET V. ALBERTYN. 1896. Aug. 25th. „ 26th.

This was an action brought to recover the sum of £485, claimed upon a contract to alter and rebuild a house belonging to defendant.

The following was the plaintiff's declaration:

1. The plaintiff is a builder and contractor, and resides at St. James. The defendant is a farmer, and resides at Muizenberg.

2. On or about the month of April, 1895, the plaintiff was employed by the defendant to effect certain alterations and additions to defendant's house at Muizenberg, and to provide certain materials for the same.

3. The sum which the plaintiff was to receive for executing the said alterations and additions and providing the said materials was the amount of £300.

4. After the plaintiff had commenced work upon the said house, the defendant requested the plaintiff to undertake other and further alterations and additions to the said house, and to supply additional materials above and beyond those referred to in paragraph 2 of this declaration, and the defendant undertook to pay for the said additional work and materials as extras.

5. The plaintiff duly executed the said works, and provided materials for the said additions and alterations referred to in paragraphs 2 and 4 of this declaration.

6. The extras referred to in paragraph 4 of this declaration amount to the sum of £460, particulars of which appear in the account marked A, annexed to this declaration.

7. The said sum of £460 is a fair and reasonable compensation for the work, labour and skill employed by plaintiff, and the material supplied by him as aforesaid.

8. At divers times during the year 1895, the defendant paid the plaintiff the sum of £775 in respect of the work done and material supplied under the agreement referred to in paragraph 2 of this declaration, but the defendant wrongfully and unlawfully refuses to pay the plaintiff the sums of £25 and £460 which the plaintiff says he is entitled to demand from the defendant, as will more clearly appear from account marked A hereinbefore referred to.

Wherefore the plaintiff prays:

(*a*) For judgment in the sum of £485 with interest *a temporæ moræ*.

(*b*) Alternative relief.

(*c*) Costs of suit.

Annexure A referred to in paragraph 6 of the foregoing declaration.

For building and altering house at Muizenberg and supplying material as per agreement, referred to in paragraph 2 of the declaration	£800	0	0
For extras referred to in paragraph 4 of declaration:			
Extra work to back portion of house instead of old lean-to roof, raising walls, building yard and servant's room, stairs, dormer windows, building boundary walls with gates, breaking in two windows and one door, making alterations to foundations, and supplying all material and labour for the above ...	£460	0	0
	1,260	0	0
Less paid on account	775	0	0
Balance	£485	0	0

The defendant's plea was as follows:

For a plea to the declaration the defendant says:

1. He admits the allegations in the first three paragraphs of the declaration.

2. As to the 4th paragraph he admits that he requested plaintiff thereafter to perform and supply certain additional work and material in and about the said house, and that he is liable to pay a fair and reasonable price for the additional work and material so performed and supplied.

3. As to the 5th paragraph he admits that the plaintiff executed the said additional works and supplied some, though not all, of the material required for the said works. The defendant supplied all the stone, clay and sand required therefor, and also carted all the additional materials required by the plaintiff from the Railway-station at Muizenberg to the said house.

4. As to paragraphs 6 and 7 he says that the extra work and material for which the plaintiff is entitled to claim payment as aforesaid is of the value of £157 5s. 10d., and that the said sum is a fair and reasonable compensation for the said work and materials; subject to the above, he denies the allegations in the said paragraphs.

5. He admits the payment by him to the plaintiff of the sum of £775 as alleged in the 8th paragraph, and hereby tenders to pay to the plaintiff the sum of £182 5s. 10d. with taxed costs to date, which is all that is due and owing by him in respect of the said account and the said extras; subject to the above, he denies the allegations in the 8th paragraph.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The plaintiff in his replication said:

1. He admits that the defendant supplied the sand and clay required for the work, and also carted the materials supplied by the plaintiff from the Railway-station at Muizenberg to the said house, for which material and services the plaintiff says he has made no charge to the defendant, the latter having agreed to supply all sand and clay and to cart all materials required for the said work.

Otherwise the replication was general.

On these pleadings issue was joined.

Mr. Graham, with whom was Mr. Buchanan, appeared for the plaintiff, and Mr. Innes, Q.C., with whom was Mr. Close, appeared for the defendant.

Wm. Fred. Auret, the plaintiff, said he was a builder and contractor, and resided at Muizenberg. He had known the defendant from boyhood, and up to the present they had been on friendly terms. In April witness agreed to do some work for defendant, to make an alteration to a building. There was no written agreement. Witness gave his price as £90. The height of the building was to be ten feet. Defendant agreed to the price, £90. Witness started with the work on April 23. Defendant then asked witness what he would undertake certain additional alterations for, and witness replied £200. Further alterations were agreed upon to cost another £300. Subsequently Mrs. Albertyn wanted a wall extended beyond the limits specified in the three previous agreements. Defendant agreed that this work should be paid for as an extra. When witness rendered defendant an account for extra work defendant said there were no extras, and declined to pay. The charges made were as low as possible.

Cross-examined: Defendant only supplied stone for the boundary wall, and a little for the

back. The greater portion of the stone came from the old building, and belonged to witness.

Johannes Egbertus Vixseboxse, architect, stated that he drew the plans for the building in question. He estimated the cost as the cost of an entirely new building, at £1,617 7s. 2d. This was exclusive of the sand, stone, and clay. The estimated cost of the extra work claimed for by the plaintiff was £538 6s. 9d. This last estimate was based on information given by the plaintiff.

By the Court: His estimate allowed for the class of work usually put into buildings of the kind.

Cross-examined: The plaintiff's contract was too low. Plaintiff had not allowed for his own labour.

Samuel Solomon Blumenthal Mills, builder and contractor, said the work had been done well "for that class of work." Mr. Vixseboxse's estimates and bills of quantities appeared to be right, and were not too high. He took Mr. Vixseboxse's data. The prices, taking the items generally, were about the Cape Town prices.

Robert Coghlan, a partner in the firm of Cherry & Coghlan, builders and contractors, said he considered that the work was very well done for its class. He considered that some of Mr. Vixseboxes's prices were too low. He could not build a similar house for the amount of the estimates. Of course he knew nothing about the alleged arrangement as to the supply of material.

Andries Albertus Bruyns, a farmer, residing near Muizenberg, said he was on good terms with both parties. He supplied the plaintiff with several loads of bricks before the house was built. Defendant told him that the house would cost him £1,200.

Cross-examined: Defendant did not go into particulars.

Abraham Zacharias Auret, a brother of the plaintiff, residing at Muizenberg, said that while the house was being painted, and after the boundary wall had been built, defendant told him that with the extras the building would cost over £1,200.

Franz Kayser, a coloured man, Abdol Garedier, a Malay, and Abdol Sabaan gave evidence as to the construction of the building.

Henry Peter Hanson, builder and contractor, Muizenberg, said he tendered for a portion of the building for £350. Defendant thought it was too high, but the witness said he could not do it for any less. He gave defendant the plans which he had prepared. Witness thought that Mr. Vixseboxse's prices were fair, and according to the usual tariff of prices for that class of work. He understood that there was a dispute about the extras between the parties. He thought that £460 was a fair estimate according to the quantities and specifications given.

Cross-examined: He had not gone into details himself.

This closed the case for the plaintiff.

For the defence Mr. Innes called

Henry Albertyn, the defendant, who said he resided at Muizenberg, and he and the plaintiff had been good friends since boyhood. In April, 1895, negotiations were entered into with plaintiff to do certain work. It was agreed that plaintiff should do certain building work for £300. Plaintiff said he would raise certain walls for an additional £60. Defendant replied, "Frickie, if you make a good job of it I will give you £75." Nothing was said about doing this portion of the work for £.00. Subsequently further alterations and work were agreed upon, and defendant asked plaintiff what he would charge for the job as a whole, the first-named prices having "fallen away." Plaintiff said, "Give me £800 for the whole lot; that is the cheapest I can do it for." Defendant replied that this price was rather high—could not plaintiff do the work for £750 if defendant supplied all the materials? Plaintiff said he could not do the job for less, and as it was he was not charging for his own time. At a later date plaintiff again informed defendant that he could not do the work for less than £800, but that as to the boundary wall he would only charge for labour, lime, and bricks. Defendant replied, "All right, go on." He supplied the stone for the wall, and whatever stone was wanted for the house in addition to the stone taken out of the old house. He had not kept any account of the number of loads supplied, and carted all the material from the station. He paid plaintiff £775 for the work, and subsequently he received a letter from plaintiff demanding a further £460 for extras. He asked plaintiff what this meant, as he knew nothing about extras. Plaintiff said he was losing money on the job, and eventually, in view of this, defendant said he would meet plaintiff part way, and give him £100. Plaintiff said £100 was not much. Defendant replied, "I won't pay you £460." Subsequently after the work had been appraised by Mr. Black, defendant tendered £182, in view of the statement of plaintiff that he was losing money on the job. Defendant was anxious to keep the matter ont of court.

Cross-examined: He held that the only legal extras were the windows and the front wall. He

had tendered £182 for this work because plaintiff said that he was losing money on the job. Plaintiff was frequently absent from the work. He was always away up the mountain looking out for whales. He had told Zacharias Auret and De Bruyn that he thought the whole thing would cost about £1,200, but when he stated this he included all his own labour and the material supplied by him. He thought that he would get plaintiff's job done for £800. The house was not so good as it looked. The roof would blow away one of these days. He had told someone that he was satisfied with the brickwork of the building.

Re examined: He had left the matter of tender in the hands of his attorney, with the view of keeping the matter out of court.

By the Court: There was no writing between the parties from beginning to end.

Mrs. C. A. Albertyn, the wife of the defendant, corroborated.

Thomas Coller, coloured, Henry Albertyn, son of the defendant, and Christoffel Albertyn, eldest son of the defendant, also corroborated.

William Black, architect and civil engineer, said he inspected the property in question about the 1st of April last. The work was of a second-class nature, and was decidedly "jerry" in places, being patched up. This particularly applied to the carpentering work. The roof needed strengthening. He had valued certain portions of the work, according to the list put in, the total valuation being for extras £176 5s. 11d., and less deductions £38 10s, £137 15s. 11d. Adding to this £45, the balance admitted to be due for certain undisputed items the total worked out at about £182. The verandah was not finished off at all well, and the gates were falling to pieces.

Cross-examined: He would undertake to build a house of the same class, and under similar conditions, for between £1,450 and £1,500. Mr. Vixseboxse's estimate was too high for that class of work.

Adolphus William Ackermann, an architect, said he had gone through Mr. Black's figures and prices, and believed them to be fair for the class of work. He entirely agreed with Mr. Black's results.

Cross-examined: The value of the house as it stood now was about £1,600, as far as he could judge.

This closed the evidence.

After argument,

The Acting Chief Justice said: This case displays a very great want of business capacity on the part of the defendant and the plaintiff, and evidence of both the defendant and the plaintiff proves the exceedingly casual manner in which the contract was entered into. It appears that the defendant had an old house which he wanted to renew. He first began by having the front part of it renewed. As he went on he wished to have the middle renewed, and then one end. At this juncture the lady came upon the scene, and she seeing how much the house was improved by the renewals in front, wanted the improvements extended over the whole of the building. There was no definite contract at that time as to the cost of repairing the whole of the house. The plaintiff states that he agreed to do the first part for £300, the middle for £200, and the back part up to a certain line for £300, making £800 in all. The defendant admits that there was a contract for £800 but he contends that it included the renewal of the house to the extreme end of the building from the railway line to the front. The first question which we have in dispute between the parties is as to how much of the work done by the plaintiff was this £800 to cover. From the loose way in which the work was done and in which the contract was entered into, it would have been very difficult indeed to decide one way or the other on the *vivâ voce* evidence. I do not think that the defendant or the plaintiff came into court with the wish directly to mislead the Court but the conversations were of such a casual nature, that it was very difficult to say what conclusion they mutually arrived at. On the 18th of January the plaintiff furnished an account to the plaintiff, which, I think, bears out the defendant's version of the story, as the first item is that "for building a house at Muizenberg, £800." The plaintiff does not say for building up to the disputed line, but he says building the whole house for £800. On the evidence taken as a whole, I think that £800 was agreed upon to cover the whole house so erected. The parties are at one as that £775 was paid off the £800 by the defendant to the plaintiff. The sum of £25 is therefore still due, under this head of account, which amount the defendant tenders to the plaintiff. But, as is almost invariably the case in building contracts, there are a number of extras. In this case they are ranged under five heads. The defendant has pleaded a tender, for these extras, and thus for the purposes of this case admits the items claimed for to be extras. The first of these is the raising of the wall. Mr. Vixseboxse, who has prepared plans of the most careful and elaborate nature and has gone into details most fully, estimates this item at £87 8s. 9d. Mr. Black, with the assistance of Mr. Ackermann, went down and examined the work, and his estimate for this item is only £47

10s. 8d. But it is clear from his evidence and from that of Mr. Ackermann, that he did not know the whole of the work done when he estimated this amount. The second item of the extras is yard and servants' room, £100. This item Mr. Vixseboxse has gone into, and his estimate shows that he considers that £109 2s. would be a fair amount to allow for this, which is £9 2s. more than the plaintiff himself claims for it. Mr. Black in going over it allows £58 1s., but he admits that he did not allow for the staircase, the dormer windows, and the dormer doors and nothing was said about the gate supplied by the plaintiff. On the next item the plaintiff claims £100, but Mr. Black allows only £54 4s. 8d., but in the cross-examination his evidence shows that he erred in the line of estimating too little. The fourth item of the extra is letting in windows, area doors, &c., £40. Here the architects, for once, are substantially agreed, there being a difference of only 8s. between their estimates. As to the fifth item, altering the foundations, it is clear that the foundations were altered at defendant's request. It is very difficult, however, to ascertain what was really the value of the work done under this item. Mr. Vixseboxse estimates it at £22. Mr. Black says he did not estimate for this item at all, but admits that he would have allowed £20 for it. Here again the estimate is slightly over the amount claimed by the plaintiff. Roughly speaking, Mr. Vixseboxse's estimate for the whole of the items which are admitted to be extras by the defendant amounts to £310. Mr. Black's estimate for the extras amounts to £219—call it £220. In a case like this, it is very difficult for the Court to arrive at the accurate amount to be allowed. I think the fair way would be to take the average of the architects' estimates, which would be £280. This is, I think, a fair estimate of the value of the work admitted by the architects to have been done by the contractor. It is not, in my opinion, an excessive amount to allow for the extras. Added to this, there is the sum of £25, which is due on the original contract, making in all £305. Judgment will be for the plaintiff for £305 with costs, plaintiff to be allowed witnesses' expenses.

Their lordships concurred.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorney, Gus. Trollip.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

KATZENSTEIN V. POWELL. { 1896. Aug. 27th.

Mr. Castens applied for provisional judgment upon a mortgage bond for £200, and interest at 8 per cent. from January 5, 1896, and that the property specially hypothecated be declared executable.

Granted.

ARDERNE V. OHLSSON.

Mr. Tredgold applied for provisional judgment upon a mortgage bond for £200, and interest from June 30, 1893; and upon another bond for £50, with interest from June 30, 1893.

Granted, the property specially hypothecated being declared executable.

ILLIQUID ROLL.

MARTINUS' EXECUTOR V. MARTINUS.

Mr. Benjamin applied for transfer of certain lands and the rendering of a full account of the property of the joint estate and that of the surviving spouse.

Granted in terms of prayers (*a*) and (*b*) with costs.

MARTIN'S TRUSTEE V. DE VILLIERS.

Mr. Benjamin applied for an order calling upon the defendant forthwith to render a true account of his dealings to the trustee, and of the outstanding debts due to the trustee, and for judgment for the amount found to be due to the plaintiff.

The Court granted an order in terms of paragraph 1 of the application, with costs.

IN THE MATTER OF SYBRAND J. A. MOSTERT.

Mr. Molteno applied for the appointment of some suitable person to represent the said Mostert, who is under curatorship by reason of his being a deaf mute, or nearly so, in the execution of an ante-nuptial contract, he being desirous, with the consent of his mother and curators, to contract a marriage.

The Court declined to make an order, on the ground that the matter was one for the curators to deal with.

PEDERSON V. HUGHES.

Mr. Graham applied for an order requiring defendant to give due and proper security for the amount of the plaintiff's claim and costs in the suit instituted against him, or otherwise in default thereof for the attachment of his person.

The Court declined to grant an order, on the ground that no fraud had been proved.

BOTHA V. HENNING.

This was an application by the defendant for removal of the suit between the parties for trial at the next Circuit Court to be held at Burghersdorp, as both parties reside in the district of Albert, and the grievances complained of occurred there.

Mr. Searle, Q.C., for the defendant.

The Court granted the order, the costs to be costs in the cause.

GOTTHELF V. GOTTHELF. { 1896. Aug. 27th.

This was an action for divorce on the ground of the alleged adultery of the defendant.

Mr. Buchanan for the plaintiff; defendant in default.

Emmanuel Gotthelf, the plaintiff, said he was married to the defendant in Poland in 1888. Five years ago plaintiff came to Cape Town, and twelve months later his wife joined him. During that time his wife went out very much. In consequence of information received, plaintiff watched a man named Max Gluck, and frequently saw him enter defendant's bedroom while defendant was present. On one occasion he caught both of them in bed together. In the month of May three years ago, defendant left plaintiff and resided at the Masonic Hotel, and had not joined him again. Twelve months after defendant left plaintiff she had a child. Plaintiff saw her at Mouille Point with the baby in her arms. There were three minor children of the marriage, who had been in his custody since they were born. Defendant was now living in Cape Town. No communications had passed between the parties since defendant left him. He had always treated her well.

John William Smith, a plumber living in Francis-street, Cape Town, said he knew the defendant. About three years ago two men, named Gluck, visited defendant's bedroom while she was present three or four times.

Mrs. Johanna Barendse, a washerwoman residing at Woodstock, recognised the photograph of the defendant produced as being that of Mrs. Gluck. Defendant introduced herself to witness as Mrs. Gluck. She lived with a man named Gluck.

The Court granted a decree as prayed, plaintiff to have the custody of the children of the marriage, defendant to have access to them at all reasonable times and places.

[Plaintiff's Attorney, J. Ayliff.]

NEETHLING'S TRUSTEES V. ALFORD, WILLS & CO. { 1896. Aug. 27th.

Insolvency--Undue Preference—Ordinance 6 of 1843, sections 84 and 86—Contemplation of sequestration—Ordinary course of business—Act 38 of 1884—Onus.

N., *a "togtganger," paid* A. £130 *shortly before the sequestration of his estate.*

A., *set up the defence that the payment was made in the usual course of business, at a time when there was no contemplation of insolvency.*

It was proved that the defendant was actually insolvent at the time the payment was made, but that some of the rest of the debts were old debts for which the creditors would not have pressed.

The Court held *that under the circumstances of the case the defendant had rebutted the presumption raised by Act* 38 *of* 1884, *section* 8, *and that at the time the payment was made there was no actual contemplation of insolvency and that the payment was made in the way of business usual with men of* N.'s *calling.*

This was an action by the trustee in the insolvent estate of J. S. Neethling to set aside a certain payment to the defendant as an undue preference.

The following was the plaintiff's declaration:

1. The plaintiff has been lawfully appointed as the sole trustee of the insolvent estate of one Jacobus Stephanus Neethling, of the Paarl, whose voluntary surrender of his estate as insolvent was accepted on the 14th day of December, 1895.

2. The defendants carry on business in Cape Town in partnership under the style or firm of Alford, Wills and Company.

3. On the 23rd day of November, 1895, the liabilities of the said Neethling, fairly calculated, exceeded his assets, fairly valued.

4. On the said 23rd day of November, 1895, the said Neethling was indebted to the defendants in the sums of £120 and £10 under

two promissory notes then overdue, and on that day he paid the amounts of the said promissory notes to the defendants.

5. The said payment was made at a time when the said Neethling contemplated the sequestration of his estate, and he by the said payments intended to prefer, and did prefer, the defendants before his other concurrent creditors, by reason whereof the said payment was and is an undue preference within the meaning of section 84 of Ordinance No 6 of 1843.

6. All things have happened, entitling the plaintiff in his said capacity to demand, and he has demanded from the defendants the sum of £130, so paid to the defendants as aforesaid, together with interest from the 23rd day of November, 1895, but the defendants refuse to pay the said sum.

Wherefore the plaintiff prays for:

(*a*) An order declaring the said payment to be an undue preference in terms of section 84 of Ordinance No. 6 of 1843.

(*b*) Judgment for the sum of £130 sterling, with interest from the 23rd day of November, 1895.

(*c*) Other relief.

(*d*) Costs of suit.

The defendants' plea was as follows:

1. They admit the allegations in the 1st, 2nd, and 4th paragraphs, but they deny the allegations contained in the 3rd paragraph of the declaration.

2. They deny the 5th paragraph and they say specially that on the said 23rd day of November. 1895, the said Neethling did not contemplate the sequestration of his estate, and did not by the payments aforesaid intend to prefer the defendant before his other creditors.

3. The payments referred to in the 4th paragraph of the declaration were made by the insolvent in the usual and ordinary course of trade or business and not otherwise.

4. They admit their refusal to pay to the plaintiff the sum of £130 demanded by him, but they deny the other allegations in the 6th paragraph of the declaration.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

Upon these pleadings issue was joined.

Mr. Schreiner, Q.C., with whom was Mr. Buchanan, for the plaintiffs; Mr. Innes. Q.C., with whom was Mr. Castens, for the defendants.

Cornelius Johannes Muller, a clerk in the office of the Master, produced the papers in the insolvency proceedings.

Jacob Isaac de Villiers, M.L.A., the trustee in the estate, said he resided at the Paarl. The liabilities of the estate were, according to the schedules, £1,082 17s. 6d., and the assets £796 15s., £700 of which was immovable. The deficiency therefore was £286 2s. 6d. The schedules were drawn up on the 2nd of December. 1895. Witness thought that he realised the assets very satisfactorily. The land realised £606 by public auction, and the movable property £95 16s., the total being £6:9 16s. The cost of administration so far had been £51 16s. 1d. Witness had a balance of £644 19s. 11d. available for distribution, of which £636 had been paid in the disposal of the first bond of £600 and interest, and £14 19s. 11d. had been awarded to the second bondholder, whose bond was £95. £287 18s. 1d. was outstanding, and of this amount £252 was the outstanding account of Mr. Visser, due under a judgment obtained on the 28th of November, 1895, at the Resident Magistrate's Court, Paarl. On November 23, 1893, defendant was hopelessly insolvent. Besides the claims which had been proved, there were claims which for the present figured as being satisfied, such as Faure, Neethling & Co, £40—according to the insolvent. Faure, Neethling & Co. had made no proof of their claim. The insolvent was a small farmer, and used frequently to go away on "togt." Shortly before his insolvency insolvent came back from "togt," and according to his own evidence gave thirty-seven goats and sheep to a creditor at the Paarl in satisfaction of a debt of £18 10s. Other small payments were made during November by insolvent to other creditors. In November witness, acting as agent for one Visser, demanded payment from the insolvent of a sum of £250, due on a promissory note. No reply was received to this letter, and on November 24 a summons was issued. Insolvent then interviewed witness, and offered a dividend of 2s. 6d. in the £, but subsequently increased the offer to 5s., saying he would increase it if he could get the money. Witness asked him what he had done with his money, and he said he had paid it to Alford, Wills & Co. No compromise was arrived at.

Cross-examined: Both bonds were passed by the insolvent about two years ago.

Johannes Visser, a blacksmith, residing at the Paarl, said the promissory note made in his favour by insolvent in March, 1893, was for carts and wagons supplied by witness to insolvent. He put the case in Mr. De Villiers's hands. A few days later insolvent said he wanted to have a voluntary sale of his movable property, so that he could pay witness. Witness referred him to his agent. Subsequently insolvent suggested a dividend of 5s. in the £, but made no definite offer of payment to witness. In 1893 witness declined to supply insolvent with any more wagons, as he owed him too much money

When witness heard that insolvent was going to pay Alford & Wills, witness pressed insolvent for payment of his claim.

This concluded the case for the plaintiff.

For the defence,

Wm. Richard Finlayson said that in November last he was employed by Alford, Wills & Co. He knew insolvent, who had been trading with them since 1894. The transaction was in May, 1894. The usual mode of business of the firm was that when bills fell due notices were sent to customers. When the bills of £10 and £120 fell due, notices were sent to the insolvent. Witness was in the office when Neethling came and paid £130. At that time the firm were prepared to supply insolvent with further goods.

Cross-examined: Insolvent did not tell witness that he was being pressed by a creditor named Visser. When witness's firm offered to supply insolvent with further goods, no mention was made of other creditors. He did not remember any conversation about interest.

Wm. Christopher Abbott, in the employ of Alford, Wills & Co., corroborated.

Wm Abbott, a partner in the firm of Alford, Wills & Co., said ordinary matters transacted by the firm were left to the discretion of Mr. Slade. Witness did not think it was necessary to take the evidence of Mr. Slade on commission, although he left for England before the pleadings in the case closed.

Re-examined: In scores of cases small bills had been allowed to run without payment of interest.

Jacobus Stephanus Neethling, the insolvent, said that since 1891 he had been in the habit of getting wagons from Visser, and going on "togt." He had incurred a debt to Visser, for which he had signed a promissory note of £250. Originally the debt was higher than £250, but he had paid off portions of it. In 1893 Visser declined to supply him with wagons, and in 1894 he obtained merchandise from Alford, Wills & Co. to take on "togt." He made two "togts." On the first "togt" he paid off all he owed to Alford, Wills & Co. with the exception of £10. This was out of borrowed money. He paid Visser £157 13s. from the proceeds of the "togt." For the second "togt" he signed a bill for £120 in favour of Alford, Wills & Co. He received several notices from them regarding the £10 owing to them by him. Visser asked him to pay him something of what he owed to him. Insolvent replied, "Our agreement is to pay you only out of the profits." Eventually Visser said that was an end of the matter, and no more was said. When he came to town he visited Alford, Wills & Co., and paid the £130 to a man with a red beard. Before the insolvency he expected to get a good harvest from his farm, and on this account he asked Visser to wait a little.

Cross-examined: He was introduced to Alford, Wills & Co. by a Mr. Smith, of Wellington. He thought he had a document showing what he had paid to Visser.

Jacob Isaac de Villiers, recalled, denied that he had ever offered to lend insolvent any money. He had not been able to find from the documents filed that insolvent had paid Visser £80 and £75 in money or kind since insolvent had transactions with Alford, Wills & Co.

The witness Visser, recalled, said he had promised never to sue insolvent providing that insolvent had paid him something, even £10. But insolvent never paid him anything on the notes referred to. He had not paid witness a farthing since he paid him the £80 and £75 at the end of 1893 or the beginning of 1894.

Peter Johannes Lesper said he was the holder of the second bond of £95 on insolvent's property, of which £14 19s. 11d. had been paid off. He was guaranteeing the expenses of the trustee in the present case.

This concluded the evidence.

Mr. Schreiner: The only onus by law on plaintiff has been abundantly met by proof that in November last the estate was insolvent. The onus is now cast by section 86, Ordinance 6 of 1843, and by Act 38 of 1884 on the defendant. What was the motive? The onus is not on plaintiff, but the intention (as distinguished from the motive) was to prefer Alford. All plaintiff has to do is to satisfy the Court not affirmatively but negatively, by showing that plaintiff has not rebutted the legal presumption by his evidence. The facts do this. In *Jordaan's Trustee* v. *Fletcher* (4 Sheil, 64), there was no proof of collusion by Fletcher or the proof of anything on Jordaan's part but desire to increase his credit. Plaintiff comes in under the six months clause (section 8, Act 38 of 1884) first interpreted in *Slater's Trustee* v. *Smith & Co.* (5 E.D., 9). See also *Van Reneu's Trustee* v *Abel* (1 Sheil, 231). On the general question of intention to prefer and contemplation—and *bona-fide* payment—see *Du Plooy's Trustee* v. *Plewman* (7 Juta. 332). This shows how narrowly Court will scrutinise whether a payment was made in "ordinary course of business;" the phrase being there interpreted. It shows the importance of putting defendant to proving, not that what he did is usually done by him in *his* business—but that it was what would be done in the usual course of business by reasonable men. It was clearly the insolvent's duty not to make the payment. It was

clearly a preference—it was not in the ordinary course of trade or business. In fact the man who made the agreement the bookkeeper, is not called by defendant. The ordinary course is to make charges for interest on renewed bills—yet here they not only charge no interest but actually allow a small discount. After all what does section 86 mean, especially the words *prima facie*? *Du Plooy's Case* (p. 335 shows that the defendant must prove his care *beyond any doubt*.

Mr. Innes not called on.

The Acting Chief Justice said: This action was brought by the trustee of Neethling to set aside the payment made by the insolvent to the defendants, Alford & Wills, of £30 shortly before the sequestration of the estate. The defence set up is (1) that there was no contemplation of sequestration under the 84th section of the Ordinance, and (2) that the payment was made in the usual ordinary course of business. I agree with Mr. Schreiner, that under the Act of 1884 where payment is made within six months of the sequestration at a time when the liabilities fairly calculated, exceeded the assets fairly valued the onus is thrown upon the person receiving payment to prove that there is no contemplation of sequestration. In this case the insolvent's position was no worse at the time of sequestration than it was some time before, and the question to be considered is whether the defendants have rebutted the presumption of sequestration raised by the Act of 1884. On this point the insolvent himself has been called, and said that he had no contemplation of the surrender of his estate at the time he made this payment, and that he had no intention to prefer. Of course, the bare statement of the insolvent, is not necessarily conclusion, but it is an element in the case, and if the other circumstances proved fit in with the insolvent's statement, there is no law to prevent the Court from accepting the oath of the insolvent that he had no contemplation of sequestration. If the circumstances of the case did not fit in the Court might reasonably prefer to infer the insolvent's intention from his acts, and not merely from his evidence. The insolvent in this case, while in the witness-box, created a very favourable impression upon the Court. He has distinctly sworn that he had no contemplation of surrender, and I think that all the surrounding circumstances fit in with that statement. His debt due to Visser was an old debt, and Visser himself in the box said that if he had received a small payment of £10 or £15 now and again he would never have pressed the insolvent. The insolvent having returned from a "togt" with the proceeds of goods supplied by the defendants, wished to act honestly by them and came to town to pay them, and to obtain further goods. He refused to pay any of the proceeds of defendants' goods to Visser before he left. Judging from Visser's conduct to him in the past, and from what Visser stated to him then and after, I think the insolvent is correct in saying that he did not consider that Visser would press him further. Even after he returned from town he had sufficient hopes that Visser would not press him. In the view I take of the evidence there is nothing to show that the insolvent came to town contemplating sequestration. Holding this opinion, I need not discuss the further question as to the ordinary course of business, I am certainly not prepared to say that this defence has failed. The insolvent did on this occasion as he had done on previous occasions, and it is said to be the custom of "togtgangers" to settle for their purchases on realising the proceeds of their trip. The fact that the bills given when the purchases were made, were a few days overdue when a settlement took place, would not alone necessarily invalidate the payment. However that may be on the first ground of defence I think that the defendants have rebutted the presumption of contemplation of sequestration, and that judgment should be given for the defendants with costs.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon: I agree that judgment should be given for the defendants, but I prefer to base my decision entirely upon the ground that the defendants have succeeded in rebutting the presumption of contemplation of insolvency, which is raised by the fact that the payment in question was made by the insolvent less than six months before his insolvency. As regards the defence that the payment was made in the usual and ordinary course of business I have always felt that the 86th section of the Insolvent Ordinance is a very difficult one to deal with, and I think it better therefore to avoid expressing any decided opinion upon this second point seeing that there is no necessity for so doing. The Court having decided in *Du Plooy's Trustee* v. *Plewman* that the fact of a payment having been made in the usual and ordinary course of business affords a protection, even where there is sufficient proof of contemplation of sequestration and of an intention to prefer, it becomes all the more necessary to place a very strict construction upon the words "usual and ordinary course of business," and not to extend the protection of the 86th section to any transaction where there has been the least departure from such

cour e of business. Otherwise we shall find, if the words are not very strictly construed, that so many transactions might be included under the expression, that it will be difficult to know where to stop. I therefore express no opinion upon that part of the case, as I am quite satisfied that the defendant is entitled to succeed upon the first point taken on his behalf. The question of contemplation of insolvency by an insolvent is a question of fact as to the state of the insolvent's mind at the time when the payment was made, and although under the Act of 1884 a presumption of contemplation arises in certain circumstances that presumption is one which of course may be rebutted. And in coming to a decision upon this question of fact a Court may of course be greatly influenced by the evidence of the insolvent himself. It is needless to say that the Court may refuse to believe an insolvent even though he states that he was not contemplating insolvency at the time in question: but on the other hand, where the Court is satisfied from the manner in which the insolvent gives his evidence that he is speaking the truth, and he further finds that his evidence is supported by the general circumstances of the case, it is c'early the duty of the Court to act upon his evidence. In the present case I was very favourably impressed with the manner in which the insolvent gave his evidence, and I find that his evidence is quite consistent with the circumstances of the case. It is quite true, no doubt, that he was in insolvent circumstances at the time when the payment was made; but the evidence shows that he was in exactly the same position then as he had been for two or three years before. And yet it never could be suggested that during all that time he was contemplating insolvency. The fact of the matter is that Visser was the only creditor from whom the insolvent had anything to fear; and it is clear from his own evidence that he was such a particularly patient and long-suffering creditor that the insolvent scarcely regarded the possibility of his pressing him for payment. No doubt Visser says that when the insolvent told him he was going to pay the defendants, he was indignant, and told the insolvent that he would "put a stop to this." The insolvent, however, says that he did not understand him to mean that he was going to take proceedings against him: and looking at the manner in which his evidence was given and at Visser's previous conduct to him I quite believe what he said. Visser as a matter of fact did intend to take proceedings, and straightway went and put the matter into the hands of his agent; but I believe the insolvent when he says that he did not receive the agent's letter until after his return from Cape Town, and that up to that time the idea of insolvency had not occurred to his mind. That being so, I am of opinion that the defendant has succeeded in rebutting the contemplation of insolvency raised under Act 38 of 1884, and that judgment should therefore be for the defendant.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

AITCHISON v. AITCHISON. } 1896. Aug. 28th.

This was an action for restitution of conjugal rights, failing which plaintiff asked for a rule *nisi* for divorce.

Mr. Benjamin for plaintiff; defendant in default.

Mrs. Alice Maud Aitchison, the plaintiff, residing at Malmesbury, said she was married to the defendant at Kimberley on 21st December, 1885, without community of property. Defendant's occupation was then that of a clerk in the Civil Service. They stayed at Kimberley for about three months, and then left for Queen's Town. While at Queen's Town defendant was not particularly kind to her. In 1889 they went to live at Malmesbury. Defendant left for Australia on 1st of January, 1891. While at Malmesbury there were differences between them, and he ill-treated her. Defendant paid too much attention to somebody else, and occasionally defendant remained away from home all night. In January, 1891, he got into difficulties in the Service, and said he was going to Cape Town, and would be back by the evening train. He left her, and had not since returned. His parents told her that he had gone to Australia. He had not supported her since. She was now supporting herself by teaching, and resided with her mother. She was willing to go to Australia if defendant would give her the means, and if he returned to the Cape she would receive him. There were three children of the marriage. The

parties had frequently corresponded. He had promised to return and support her ever since he left, but had not done so. Plaintiff had a little property of her own, but defendant had no property.

The Court granted a decree of restitution of conjugal rights, defendant to receive or to send for the plaintiff on or before January 1 next, failing which a rule *nisi* calling upon defendant to show cause on February 1 why a decree of divorce should not be granted. Plaintiff to have the custody of the children.

SOUTH AFRICAN SALTPETRE FIELDS V. POWER.

This was an action for the recovery of £319 0s. 11d, being the balance due on an account of £1,000.

Mr. Schreiner for the plaintiffs; defendant in default.

Charles Clarkson, general manager of the plaintiff company, said defendant was interested in certain farms in Prieska being exploited by the company. Defendant was a large shareholder in them. Before March, 1896, defendant was in this country, and received two remittances of £500 per cable. In March, 1896, plaintiff came here as manager, and defendant admitted having received the money. Defendant's duty was to spend the £1,000 on behalf of the company and to render an account, handing him the balance. On April 1 defendant handed to him a statement of expenditure admitting the expenditure of over £900 of the £1,000, leaving a balance of £58 11s. 11d. Defendant had not explained to witness, to whom he had paid an item of £168 as requested by plaintiff. Defendant claimed £168 and £300 against the company, for which there was no justification. The defendant owed the plaintiff £319 0s. 11d., which was the balance unaccounted for by defendant on the £1,000. Defendant left for England on May 20, and did not intend to come back as far as witness knew. Defendant still had an interest in the company. Witness did not know if defendant had any property in this country.

The Court granted judgment for £319 0s. 11d., with costs, the Acting Chief Justice pointing out that it being a default case the defendant could at any time re-open the case.

REHABILITATIONS,

On the application of Mr. Jones, Richard Chas. Butler was rehabilitated.

Mr. Graham applied for the rehabilitation of John Scallan.

Mr. Innes, Q.C., opposed the application.

The Court directed the matter to stand over until the 12th prox.

On the application of Mr. Tredgold, Pierre Frangois Haupt was rehabilitated.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF THE LATE JOHN L. SMYTHE.

Mr. Close applied for an order appointing Alan B. Gordon as trustee to administer the said estate, no election having been arrived at at the second meeting of creditors, but an agreement having since been come to by the creditors, who had proved, that the said Alan B. Gordon should fill the office.

The Court authorised the creditors to call a fresh meeting for the election of a trustee.

THE PETITION OF ETHEL M. MCCALLUM.

Mr. Benjamin applied for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

Granted; personal service to be effected if possible, returnable on first day of next term.

IN THE ESTATE OF JOHANNES N. KNOOP, A LUNATIC.

Mr. Close applied for authority to the Master to pay out from the surplus income of the said lunatic an amount due for the maintenance and education of his minor half-sister, and an annual allowance in the future for the like purpose.

The Court declined to grant the application.

IN THE MATTER OF THE MINORS VAN VEUREN.

Mr. Tredgold applied for authority to the Registrar of Deeds to pass transfer to the said minors of certain two portions of the farm Muggefontein, described as A and C, notwithstanding that in the petition for leave to effect such transfer, which was granted by this Court, the said descriptive letters were transposed, and the larger extent made to appear as the smaller.

The Court granted the order, subject to the certificate of the Master being granted.

THE PETITION OF CHRISTIAN F. RAU.

Mr. Tredgold applied for authority to the Registrars of Deeds at Cape Town and King William's Town to amend certain ante-nuptial contract entered into by

petitioner and Mary Rehfeldt on March 10, 1893, by describing petitioner by his right name of Christian Frederick instead of Franz Friedrich, as erroneously styled therein.

The Court granted the order.

IN THE ESTATE OF THE LATE JACOB J. J. NORTJE.

Mr. Benjamin applied for authority to the executrix testamentary to transfer, subdivide, and otherwise deal with all the landed property in the said estate without the assistance of her present husband, who deserted her about six years ago, and whose present whereabouts are unknown.

Granted.

FORBES V. BEHR. { 1896. Aug. 28th.

Sale—Auctioneer—Advertisement—Mistake as to person with whom contracting—False representation—Legal fraud—*Restitutio in integrum.*

B., *an auctioneer, advertised for sale the household furniture at a house "next to M.'s," and after enumerating some of the furniture concluded the advertisement with the words "also a piano by a good English maker."*

The piano was in fact one which B. *was anxious to sell on commission for the English maker.* B. *alleged that he had the authority of* W., *the owner of the goods advertised, to sell the piano at* W.'s *furniture sale.*

F. *alleged that knowing the goods to be* W.'s, *and that* W. *had very good furniture, he bought the piano, and that as soon as he discovered that the piano did not belong to* W. *at the time of the sale he repudiated the contract.*

Held that *the auctioneer had not in his advertisement made any fraudulent or false representation such as could in any way have reasonably misled* F., *and that the contract was a valid one.*

This was an action to recover the sum of £42 paid for a piano by plaintiff. The defendant an auctioneer, had advertised for sale "at the house next to the Rev. Mr. Maver's at Woodstock," the furniture "of a gentleman." After mentioning some of the furniture the advertisement concluded: "Also a piano by a good English maker." The piano as a fact did not belong to the gentleman whose goods were sold.

The following was the plaintiff's declaration.

1. The plaintiff resides at Beaufort West, the defendant carries on business at Cape Town as an auctioneer, under the style or firm of George C. Behr & Co.

2. On or about the 28th November, 1895, the defendant caused an advertisement to be inserted in the "Cape Times" newspaper announcing that he would sell on the said day certain household furniture, including a cottage piano, belonging to a gentleman residing in a certain house at Woodstock.

3. By reason of the announcement aforesaid, the plaintiff who was desirous of purchasing a piano belonging to the gentleman in the last section referred to, because he relied upon the said piano being an instrument of good quality, attended the defendant's sale and purchased a piano, which the defendant then offered as the property of the gentleman aforesaid.

4. The purchase price of the said piano was the sum of £42, which the plaintiff duly paid, and the said piano was thereafter delivered to him by the defendant.

5. Thereafter the plaintiff discovered that the piano was not of good quality and had never been the property of the person for whom the defendant purported to act as aforesaid.

6. The defendant was personally interested in the sale of the said piano, and wrongfully and fraudulently represented that it belonged to the gentleman for whom he was holding a sale, whereas in truth and in fact it did not so belong.

7. The plaintiff would not have attended the said sale, or purchased the said piano, but for the said representations in the defendant's advertisement as to the ownership of the piano.

8. So soon as the plaintiff ascertained the facts set forth in the 5th and 6th paragraphs of this declaration, he repudiated the said sale and purchase and demanded back the money paid by him as aforesaid and offered to return the said piano to the defendant; but the defendant refused to repay the money, or take back the piano.

9. The plaintiff has been compelled to store the said piano, and had thereby incurred expense, otherwise been damaged to the extent of £50, by reason of the defendant's fraudulent misrepresentations as aforesaid.

The plaintiff claims:

(*a*) An order declaring that the said purchase and sale was null and void, and compelling the defendant to repay to him the said sum of £42, he tendering at the same time to re-deliver to the defendant the piano aforesaid.

(*b*) Payment of the sum of £30 as damages.

(*c*) Alternative relief.

(*d*) Costs of suit.

Defendant's plea was as follows:

1. Defendant admits the allegations contained in paragraphs 1 and 4 of the declaration; he denies the allegations contained in paragraphs 6 and 7.

2. With regard to the allegations contained in paragraph 2, he admits that on or about 28th November, 1895, he caused an advertisement of a sale to be inserted in the "Cape Times," but craves leave to refer to the advertisement for the terms thereof.

3. He admits that the plaintiff attended the sale and purchased a piano thereat; save as above he denies the allegations contained in paragraph 3, and says specially that the said piano was an instrument of good quality and worth the amount paid for it by the plaintiff, and was sold by public auction in the ordinary course of business.

4. With regard to the allegations contained in paragraph 5, the defendant craves leave to refer to the statements in the last preceding paragraph of this plea; and says that the said piano was the property of Messrs. Avill & Smart, piano manufacturers, carrying on business in London.

5. The defendant admits that the plaintiff attempted to repudiate the sale of the said piano, and offered to return the same after delivery thereof, and he admits that he refused to repay the money and take back the said piano, but save as above he denies the allegations contained in paragraph 8.

6. The defendant has no knowledge of the allegations contained in paragraph 9, save that he denies that the plaintiff has suffered any damages for which he, the defendant, is liable.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Searle, Q.C.), for plaintiff.

Mr. Graham (with him Mr. Stoney) for defendant.

Charles James Waller, a railway engineer, residing in Cape Town, said he was living at Woodstock in November last. He then arranged to sell his household furniture through the defendant. When the sale took place witness was at Cookhouse. The sale was advertised in the "Cape Times," and mentioned a piano being for sale. He had not a piano as a matter of fact. Defendant asked witness's permission to put a piano on the sale, and witness did not object. Witness did not draw up the advertisement.

Mr. Justice Solomon: Are you a musician?—Very slight.

You are not known as a musician?—Oh, no.

James Muir Forbes, the plaintiff, employed in the Telegraph Department, and stationed at De Aar, said that in November last his wife resided in Cape Town, witness travelling on the Northern Border. In November last witness was desirous of purchasing a piano. At that time he received a letter at De Aar from his wife, the letter having reference to the sale of Waller's furniture. In consequence of that letter witness arranged to arrive in town by November 28. On arriving in town witness read the advertisement of the sale in the "Cape Times," and went straight out to the sale with the object of getting a good piano for his little girl. When he arrived at Waller's place he found the piano in Waller's drawing-room. The piano was put up in the usual way, the auctioneer praising the instrument and asking for a bid of fifty guineas. It was ultimately knocked down to witness for £42. The piano was delivered to witness on the 29th, and he paid for it on the 30th. He took it to Hof-street, where his wife and he resided. They left Hof-street on the 29th of November, but the landlord allowed the piano to be stored there until the end of January in this year. The piano was then stored at the residence of Mr. Spolander in Long-street, and was there now, the remainder of witness's furniture having been sent up-country. He would not have purchased the piano if it had not been offered for sale as belonging to Mr. Waller. When the case containing the piano was sent up, and he found that the piano had not belonged to Waller, he repudiated the purchase. He interviewed defendant on the matter, and the defendant said that it was his piano—that he had imported it. Witness told defendant that he did not go to the sale to buy defendant's piano, and did not want it.

Cross-examined: He was not generally furnishing his house at the time he bought the piano. He bought other articles at the time.

Mr. Graham: Did you buy them as being the property of Waller?—I bought them with the other things, as people always do at sales.

Continuing, witness said that he had heard of Waller through his wife. He bought four jackals' skins and what was stated to be a Turkish carpet.

You are not very well satisfied with that?—I don't know.

Are you going to repudiate that also?—I have not considered it yet. When I bid for the piano I did not know the name of the maker. I am not a musician. From the evidence in the lower Court, I was under the impression that there was bogus bidding.

Mr. Graham: Why?—I thought it was getting high when it reached £42.

A lady was bidding against you?—I did not see her. She could not be found afterwards. The piano was described in the advertisement as having been in use for six months, whereas it was a new one. I wanted a seasoned article, as bad things fall to pieces in dry parts of the country where I am stationed. I might or might not have purchased the piano if I had known that it was not well seasoned.

Re-examined: He was not a judge of pianos.

By the Court: He was induced to purchase the piano in the belief that all Waller's furniture was good.

Wm. Silver Darter, senior partner in the firm of Messrs. Darter & Son, said he was well acquainted with pianos. He examined the piano in question, and certified in January that its full value was £31. The piano was made by Avill & Smart, of London, who were not first-class makers. He would not call the piano a first-class piano; £30 was estimated as the price of the piano out here, including everything. He had stated to Mr. Shaw, the agent for plaintiff, that the invoice price of the piano could not have been more than £18.

Cross-examined: The cheapest piano made by Steinberg was 100 guineas, invoice price. Broadwood's pianos of the size of the piano referred to in the case could not be obtained for less than £60, the manufacturers' price being about £44 to witness, who would have to pay the duty. The freight on pianos was about 45s. a ton by a steamer. The cost to witness in importing pianos was about 30 per cent. Pianos frequently fetched more than their real value at auctions.

By the Court: The maker of the piano in question was not a first-class English maker.

Mr. Avon Saxon, a musician, said he had an experience extending over twenty years of pianos. He frequently advised persons in the purchase of pianos. He examined the piano referred to in the case that morning, and considered that £30 was its full value. He would not like to give more than £30 for it. It would not stand the climate of this country in his opinion. Its tone was not bad, but its appointments were cheap. It was jerry built, if he might put it so. He did not think he had seen one of Avill & Smart's pianos before.

Mr. G. B. Williams, A.R.M., handed in the record of the proceedings in the Resident Magistrate's Court.

This closed the case for the plaintiff.

George Conrad Behr, the defendant, an auctioneer, trading as an auctioneer in Cape Town as G. C. Behr & Co., said that in November last he sold Waller's furniture at Woodstock. Waller had no piano, and witness asked him to allow him to put up the piano with his furniture. Waller consented. Witness got these pianos on commission, the commission being 10 per cent. He obtained 10 per cent. on the sale of Waller's furniture. The bidding for the piano was very brisk, being in sovereigns, until £40 was reached, when a lady bid £41 10s. Witness tried to induce her to go another 10s, but as she declined, and plaintiff bid £42, he obtained the piano. The piano was worth about £31 10s. to him, but he had to get a profit for the manufacturers. The piano was invoiced at £17 6s. 6d., but the English and Colonial charges amounted to about 50 per cent. There was no bogus bidding at the sale—he never allowed this. He had not the slightest intention of committing a fraud on anybody. At nine out of ten sales articles were sold belonging to persons other than those responsible for the sale. He had not been able to find the lady who had bid £41 10s. for the piano. Several people saw her at the sale, but she was a perfect stranger to him.

Cross-examined: He sold Avill & Smart's pianos at auction sales and out of hand. When he disposed of them at auction sales, he generally put them in the drawing-room.

Mr. Innes: You did not say anything about the ownership of the piano?—No. Continuing, witness said that Mr. Waller thought that the piano would be an acquisition to the furnitnre.

And you thought that his furniture would be a set-off to the piano?—Well, yes. I suppose so.

People do not raise any objection to your disposing of articles belonging to other persons at auction sales?—No. I do not see why they should object, as it is an open sale.

Supposing you were to advertise a sale of china by a well-known man, would you put in with the china at that sale other china?—Well, it would be too trumpery to put up inferior china, but if the owner of the china would allow it we should have no objection.

Wm. Rolls, a clerk in the employ of the defendant, said that the lady who bid £41 10s. for the piano was standing two or three yards distant from the defendant. She was a stranger to defendant and witness. It was a *bonâ fide* bid. The cost of importing Avill & Smart's pianos was about 50 per cent.

Frederick Jackson, a piano-tuner, said he knew Avill & Smart's pianos. He had seen the piano in question, which he valued at between £38 and £40. The piano answered the description given in the advertisement of the sale.

Cross-examined: He had had no personal experience of importing pianos. The workmanship of the piano was good for the class of piano. He had taken the piano to pieces.

James Williams, employed in the Railway Department, said he was present at the sale, at which the bidding was fairly brisk.

Peter Stewart, residing at Cape Town, said that about eighteen months or two years ago he purchased an Avill & Smart piano from defendant for £35.

Mr. Innes for the plaintiff: It is not a valid defence for the auctioneer to say that he has over and over again (like other auctioneers) advertised in this way "the property of a man," and then sold other things which do not belong to that man at the sale. The false statement is, as to the ownership of the piano—the plaintiff says he bought specially because it was Waller's furniture, therefore he knew who the seller was. If the auctioneer makes statements as to who is selling—and as a fact the purchaser buys because of that, the auctioneer acts entirely at his own risk. Take the case of a connoisseur in china, glass, &c.; the purchaser buys on inducement that the seller *is* a connoisseur. So if a man breeds specially good cows, &c. This case is not on all fours. But the three grounds in law to rescind such a contract of sale are:]

1. That there was a false representation.

2. That it was fraudulent with intent to deceive and be acted on.

3. That it was relied upon, and led to the contract.

These three elements are required to justify an *actio redhibitoria* or *restitutio in integrum*. *Tate* v. *Wicht* (7 Juta, 158) shows our law on this point. *Stellenbosch Municipality* v. *Lindenberg* (3 Searle, 345) shows that the crucial test is whether the buyer is deceived by the advertisement. This is the crucial test in this case. Was Forbes misled by the knowledge that Waller was to sell? The *Stellenbosch D.C.* case was discussed in *Durr* v. *Bam* (8 Juta, 32); it differs from this in that the auctioneer here actually knew that he was saying what was not true. See *Sande* (Decis. 3, 4, 6). Now the description of the piano *as* a piano in the advertisement fulfils the details. But it doesn't fulfil the essential that it was the property of the gentleman whose furniture was being sold. The auctioneer evidently considers the selling of the furniture of a well-thought-of man an opportunity for the sale of another article which he wants to dispose of. Undoubtedly nine men out of ten would have no action, because they would not be influenced, but if the tenth man is misled he gets his remedy. As to the object—what could it have been but to induce the public to go there to bid for the piano; the advertisement is by its terms a puff. As to whether the plaintiff was induced to buy because of the advertisement—his wife writes to the husband that a friend tells her of the value of Waller's furniture and he comes down to be in time to attend the sale; the moment Forbes found it was not Waller's he repudiated the sale at once as he knew nothing of pianos.

The Court gave judgment for the defendant with costs.

The Acting Chief Justice said: In this case the plaintiff seeks to set aside a purchase made by him at auction of a piano for which he paid £42. He tenders to return the piano, and sues for the repayment of the purchase price. His ground of action is that the defendant made false and fraudulent representations to him, which induced him to make his purchase. I quite agree with the authorities cited by Mr. Innes to the effect that a seller of property is bound by the advertised conditions of sale, and that if either in the conditions of sale or in the advertisement the seller has been guilty of fraud or deceit, the purchaser has the right to redress. In this case the defendant, an auctioneer, advertised that he intended to sell certain furniture, the property of a person leaving town, and that the sale would take place at a house next to the residence of the Rev. Mr. Maver. The name of the owner of the property was not stated, but plaintiff says he was induced to go to that sale because it was Mr. Waller's furniture that was being sold. There certainly was no representation by the auctioneer, either verbally or in the advertisement, that this was Waller's property that was being sold. The advertisement might even be so read as meaning that the piano was an article quite separate from and in addition to the other furniture offered for sale. The advertisement described the piano as a cottage piano in rosewood by a good English maker, iron frame and triple movement. The expert evidence shows that this description was a fair representation. The plaintiff's case is that the piano was not by a first-class English maker. The advertisement does not say "first-class English maker," but by a good English maker. The piano was in rosewood, and was by an English maker. Whether the maker may be described as a good maker or not is a matter of opinion. If there has been any misrepresentation it certainly has not been on the part of the auctioneer. Mr. Innes admits

candidly that the auctioneer had no intent to defraud—that there was no moral fraud, but legal fraud. Mr. Innes said it was legal fraud in that the advertisement was so framed as to mislead the plaintiff, and that the plaintiff having been so misled is entitled to redress. But having gone into the evidence and having considered all the circumstances of the case, I fail to discover any such misrepresentation, and certainly there was no fraudulent misrepresentation on the part of the auctioneer. He may perhaps have given too high a price for the piano, but that is not a ground for cancelling the sale. No reasonable person attending a sale ought to have been deceived by any representation made by the auctioneer. The plaintiff alleges he was deceived in this one fact, that it was represented to him that this piano was the property of Mr. Waller, but whoever represented this to the plaintiff it was not the auctioneer. The auctioneer never made any such representations. The plaintiff got certain information from his wife, who got it from somebody else, and not from the auctioneer at all. Under these circumstances I fail to see any grounds upon which the plaintiff is entitled to succeed. I very much regret that the plaintiff should have spent his money in bringing the matter before two Courts, and I think it would have been well if he had not carried it further than his action in the Magistrate's Court. No doubt he *bona fide* believes that he has been deceived, but I do not think that any reasonable person could have been deceived by any a representations made by the defendant. Judgment must be given for the defendant with costs.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon also concurred. He said that he thought that the law on the subject had been very fairly stated by Mr. Innes. In this case to entitle the plaintiff to succeed he would have to prove three things: (1) That the representation made in the advertisement was false; (2) that it was a fraudulent representation; and (3) that it was this false representation that induced the plaintiff to purchase the piano to his detriment. He (Mr. Justice Solomon) thought that the plaintiff had succeeded in proving the first and third of these points. He thought that the statement contained in the advertisement was not entirely consistent with fact, and to that extent therefore it was false, for he thought that anyone reading the advertisement would come to the conclusion that the piano mentioned in the advertisement was the property of the owner of the rest of the furniture. That was not so in fact, and to that extent he thought that there was a statement contained in the advertisement which was not strictly consistent with fact. He also thought that it had been established that it was this false representation which had induced the plaintiff to purchase the piano and that he had been damnified thereby. He believed entirely what the plaintiff had stated in the witness-box—that he (the plaintiff) honestly believed from this advertisement that the piano belonged to Mr. Waller, and that hearing that Mr. Waller possessed good, superior furniture, he was induced to purchase the piano. The plaintiff said that he knew nothing about pianos, and that it was this statement which induced him to go to the sale and purchase the piano. But this was not sufficient. The plaintiff had further to prove that this statement, if false, was fraudulently made; that is to say that it was false to the knowledge of the defendant, and that it was made by him with the view of inducing the plaintiff to act upon it. Now, this was where he might say that he (Mr. Justice Solomon) found it impossible to agree with the argument which had been addressed to the Court on the part of the plaintiff. He could not see what improper object the auctioneer could have had or what fraudulent motive he could have had in making this statement. Would such a statement, contained in the advertisement of a sale to be held of the property of a person living on the upper main road, Roodebloem, Woodstock, adjoining the residence of the Rev. Mr. Maver, have induced any reasonable person to make the purchase of the piano? The advertisement indeed said that the furniture was well-appointed, superior household furniture. But this was merely the ordinary puff contained in advertisements of the kind and certainly had no effect upon the plaintiff. But the fact relied upon by the plaintiff was, that it was owing to the fact of this piano being stated to be the property of Mr. Waller that induced him to purchase it. Such a statement, however, never could have been intended to induce any member of the public to buy the piano. If it had been advertised as the piano of Mr. Avon Saxon, or of any other person believed to possess a good piano, he could understand the object of the auctioneer in putting in a statement of that sort in order to induce the public to go to the sale and purchase the piano; because the probability would be that the piano of any such person would be a superior article, but the mere fact that this piano was the property of a person living in a residence adjoining the residence of the Rev. Mr. Maver was not an inducement to the public to purchase that piano. On that ground he did not see that the fraud of the

statement, which was a false statement, had been proved, and on that ground he thought that the plaintiff had failed to establish his claim.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorney, W. E. Moore.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

SMITH V. SMITH. { 1896. Aug. 31st.

Mr. Graham appeared for the plaintiff; defendant in default.

This was a case in which the plaintiff sued her husband by edictal citation for divorce, by reason of his adultery in Heidelberg in July, 1892. The parties were married in community of property on January 13, 1885, at Wynberg. Defendant afterwards, on July 18, 1892, went through the ceremony of marriage with another woman in Heidelberg.

Reginald Douglas Herold Barry, clerk in the Colonial Office, produced the register containing an entry of the marriage of the parties.

Johanna H. Smith, the said plaintiff, she lived at Diep River. She was married on January 13, 1885, at Wynberg, in community of property. Her husband was sometimes known as Smit. After marriage they lived at Wynberg two months, when they went to Kimberley, and lived there a little over five years. Witness was then sent back to Wynberg, her husband saying he would fetch her at the end of her visit. Afterwards her husband left Kimberley, and corresponded with her. He afterwards went to Mashonaland. Whenever her husband wrote to her witness answered the letter. On October 5, 1891, her husband wrote from Heidelberg in affectionate terms. On October 18, 1892, he wrote again, and subsequently witness heard that her husband had gone through the ceremony of marriage with another woman. She brought the action because of her property. Her husband came to Cape Town last July and admitted his guilt. He said he was very sorry for what he had done. He said he didn't know how he had got "into that mess." There were no children issue of the marriage. He came from Heidelberg, and witness went to his brother's house at Diep River to see him. He had always been very kind to her, and there had been no quarrels.

Evidence taken on commission at Heidelberg was put in, which proved that defendant had gone through the ceremony of marriage with another woman named Hannah Jooste in that town on July 18, 1892.

The Court ordered a decree for divorce, defendant to be declared to have forfeited all benefits in the community of property with costs.

[Plaintiff's Attorney, C. C. Silberbauer.]

GENERAL MOTIONS.

SMITH V. SMITH.

Mr. Close applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for an order that applicant have the custody of the minor children of the marriage.

The rule was made absolute.

BONNAR V. BONNAR.

Mr. Buchanan applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights, and for an order declaring that she forfeit any benefits accruing to her under the ante-nuptial contract.

The rule was made absolute.

FRY V. FRY.

This was an application by Mr. Close (for the plaintiff) for leave to sue *in forma pauperis*.

Mrs. Fry stated to the Court that she had been deserted by her husband, who had left her without support after selling off the furnitnre, which she had brought with her on marriage. She had had him before the Resident Magistrate's Court, Wynberg, for the desertion, but he had ignored the order made by the Magistrate.

The Acting Chief Justice said this was a very hard case, and (counsel having made the usual certificate) a rule *nisi* would be granted, returnable on the 12th September.

ADMISSION.

On the application of Mr. Tredgold, James Collingwood Startup was admitted a Circuit Court attorney, the oath to be taken before the Resident Magistrate of Queen's Town.

SUPREME COURT.

Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

REHABILITATION.

In re STEYN. } 1896. Sept. 1st.

Mr. Maskew applied for the rehabilitation of Johannes Lodewyk Steyn.

Mr. Molteno opposed on behalf of the trustee on the ground that the assets were insufficient; that the debter had made over certain property to his wife; that he had given undue preference to certain creditors; that the debtor and his wife had placed obstacles in the way of the realisation of the assets, and that proper books were not kept by the debtor.

The application was refused.

The Acting Chief Justice said the insolvent had obtained a certificate of the consent of the creditors as required by section 117 of the Insolvent Ordinance. But the law also required that the insolvent should make an affidavit that he had made a full and fair surrender of his estate, and that he had given no preference to any of his creditors, and this affidavit was made. The facts before the Court however show that the insolvent did not make a full and fair surrender of the whole of his assets. The allowance of the certificate would now be refused, but the insolvent would be allowed to apply again at the end of six months. Although a sufficient number of the creditors had signed the certificate, and the 117 section says that the objection should be lodged by creditors, yet the section must be taken to allow the trustee also (as representing all creditors) to have a right as well as creditors to oppose rehabilitation The trustee was therefore justified in his opposition, and would be allowed his costs, except the costs of the last affidavit which was unnecessary and irrelevant.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE JOHAN G. BAM.

Mr. Molteno applied for authority to the Master of the Supreme Court to pay out of the Guardians' Fund the amount of fidei-commissary moneys deposited therein by the executors of the said estate for account of Sophia J. H. Roux, one of the beneficiaries, it being desired to invest the same in land, so as to produce a better return than at present derived from it.

The Court granted an order in terms of the Master's report.

STEVENS V. SMITH.

Mr. Searle, Q.C., applied to make absolute the rule *nisi* for cancellation of the sale to respondent of certain trading station known as No. 10, Governor's Drift or Haugh Drift, in the district of Herschel, sold to him about nine years ago, but not paid for in full, applicant undertaking to deposit the amount paid on account to the credit of respondent in the Guardians' Fund, less such costs as may be ordered.

The Court ordered the rule to be made absolute, with costs.

THE PETITION OF LOUISA WILLIAMS.

Mr. Smuts applied for leave to petitioner to sell and transfer without the assistance of her husband, to whom she was married in community of property, and whose whereabouts are unknown, certain two lots of ground on the Hill at Port Elizabeth, purchased by her with her own money, and to devote the proceeds to her maintenance and support.

The application was granted.

IN THE MATTER OF THE MINORS LE ROUX.

Mr. Jones applied for authority to raise a sum of money for the purpose of paying debts due by the joint estate of herself and deceased husband, on mortgage of portion of the farm Oude Muragie, in the district of Oudtshoorn, bequeathed to the said minors subject to a life interest in favour of the surviving spouse.

The application was granted.

THE UNION BANK OF CAPE TOWN.

Mr. Schreiner, Q.C., presented the seventh report of the official liquidators, as follows: The official liquidators beg to submit to the honourable Court their seventh report. The sum awarded to creditors and remaining unclaimed stands at £20 1s. 3d., and is represented by fifteen small cheques outstanding for not less than thirty-nine months. Under these circum-

stances the liquidators recommend that they be authorised to write back such of these cheques as may not have been claimed at the expiry of six months from date of publishing particulars thereof in the papers already prescribed by your honourable Court in respect to compromises. In terms of the order granted by your honourable Court, the liquidators have from time to time made refunds to the contributories who have paid in full, and amounting in all, at July 31, 1896, to £60 per share on 1,586 shares. Some of the larger debtors who had arranged, with the sanction of your honourable Court, to liquidate their engagements by periodical payments, have during the past year been able to considerably anticipate some of their payments, and further negotiations in this direction have been commenced, which, if successful are likely to bring the final liquidation of the bank within measurable distance before the expiry of another year. The liquidators regret that, looking to the somewhat peculiar nature of most of the securities now held, and the difficulty in forming any reliable estimate of their value which exists, they are not on the present occasion in a position to place any estimate of further refunds before your honourable Court. Under any circumstances the amount is not expected to be large. The liquidators annex hereto a further account showing, in tabulated form, receipts and expenditure to July 31, 1896. This account has been further amplified by showing in separate columns the receipts and payments covered by accounts previously filed, with the view of enabling your honourable Court to ascertain the progress of the liquidation without the necessity of further reference. The list of contributories who have paid their calls in full, as confirmed by your honourable Court, represented a total of 1,313 shares, and acting on authority already granted, the liquidators stated in their sixth report they had added to that list 119 shares. They have since added the names of the following who have discharged their obligations: Estate Arff, 2 shares; Miss F. Flower, 5; Miss R. P. de Villiers, 12; D. McKenzie, 52; Mrs. S. Maxwell, 53; A. B. Marais, 20; total, 154 shares, and a grand total of 1,586 shares, on which refunds have been paid as above stated. It will be seen the liquidators have kept the expense of the liquidation within the same economical limits as before. On June 2 last, your honourable Court granted Mr. Harry Gibson, secretary of the South African Association, leave of absence for five months, to date from the 30th of that month, for the purpose of enabling him to proceed to England on private business, and directed that in his absence Mr. Egbert Andries Buyskes, the bookkeeper of the same institution, should act in his stead.

G. W. STEYTLER, Secretary Colonial Orphan Chamber and Trust Company,
E. A. BUYSKES, Bookkeeper, South African Association,
Official Liquidators.

Cape Town August 27, 1896.

The Court granted the usual order for publication.

THE PETITION OF THE TRUSTEES OF THE DIOCESE OF CAPE TOWN. } 1896. Sept. 1st. „ 8th.

Trust property — Alienation — Trustee's Benefit—Powers of Court—Conditions in title.

Transfer of land was passed in favour of Diocesan Trustees for the erection and maintenance of a House of Mercy or such other charitable purposes as the Diocesan Synod should deem advisable should the House of Mercy be relinquished.

The land was bought and a large building for Refuge purposes was built on it with money raised by public subscriptions. A portion of the land had cottages upon it which required disproportionate expenditure, and money was required to clear off a debit balance remaining on the building.

With the consent of the principal subscribers application was made by the Trustees for leave to sell the portion of the ground with cottages on it, the proceeds to be devoted to the purposes of the Trust.

The Court *granted a rule nisi calling on any persons having objections to show cause why authority should not be given to the Registrar of Deeds to pass transfers to the purchasing of the property.*

Mr. Searle, Q.C., applied for leave to the trustees for the time being of the Diocese of Cape Town to sell part of lot 21, and all or any of lots 1 to 12, ground near the House of Mercy, Leliebloem. The object of the sale was to pay a debt of £650, money advanced by the trustees for the purposes of the House of Mercy. The applicants set forth in their petition that on the 18th July, 1886, certain landed property on the lower slopes of Table Mountain above Woodstock was conveyed "to the trustees of the Diocese for the time being for the erection

and maintenance of a House of Mercy . . . or for such other charitable purposes as the Diocesan Synod may judge desirable, should the said Synod upon the recommendation of the Bishop consider the relinquishment of the work of such House of Mercy desirable."

That the property with the buildings thereon amounted to the total cost of £8,000. On account whereof subscriptions amounting to about £6,200 were received from various charitable and religious institutions, and of this sum about £2,630 was contributed by the Rev. Father Puller on behalf of the society Saint John the Evangelist.

That the institution had suffered from want of adequate funds and the trustees had to advance about £650 for its maintenance.

That certain cottages were on part of lot 21, and were in a bad state of repair and did not produce a remunerative return, and petitioners desired to sell this part of the property and another portion in lots with a view to applying the proceeds to liquidating the above advances and utilising the surplus for the maintenance and improvement of the institution, the value of the land in the neighbourhood having improved greatly.

The committee of management passed a resolution in favour of obtaining authority for the sale, and the Rev. Father Puller and the superior of the Society of St. John the Evangelist consented in writing to the course proposed.

The petitioners asked for authority to dispose of the land in question by private sale or public auction with power to pass transfer and convey title to the purchasers and to devote the proceeds after deduction of all necessary costs to the purposes of the institution.

Mr. Searle: This case is parallel with that of the *Kerkeraad, D.R. Church, Wynberg* (6 Sheil, 7) and with that of the *Wynberg Infant School* (5 Sheil, 20). These cases show that the Court has taken on itself to deal with trust funds where it has been for the benefit of the trustee.

The Court granted a rule *nisi* calling upon the persons interested to show cause why the Registrar of Deeds should not pass transfer to purchasers.

The Acting Chief Justice said he did not think the Court had ever yet undertaken the authorisation of sale of trust property. In the two cases which had been cited the Court had authorised the transfer of the property; not the sale. The utmost he thought the applicants could do would be to get a rule *nisi* calling upon all persons interested to show cause why the Registrar of Deeds should not pass transfer. He thought the persons who contributed to the fund should have an opportunity of saying whether the land should be sold or not. The rule might be returnable on the first day of the November term; publication in two Cape Town newspapers.

Mr. Justice Maasdorp concurred in the grant of the rule *nisi* on the understanding that when the rule is applied for to be made absolute further legal authorities be cited in support of the proposed order.

Mr. Justice Solomon said that in view of the previous decisions in this Court he did not see why the trustees should not come to the Court as they had done in the first instance; though, but for the cases cited, he would not have been prepared to hold that the Court could assume jurisdiction in such cases. As it was he did not see any difference between this and the case of the Kerkeraad of Wynberg Dutch Reformed Church in the February term. He did not see how the Court would now be justified in refusing the application.

[Applicant's Attorney, C. C. Silberbauer.]

CROSS'S EXECUTORS V. CROSS AND OTHERS. 1896. Sept. 1st. „ 8th.

Will—Election—Legacy of property of third person—Testator's intention—Penalty clause—Disinherison—Forfeiture.

In 1886 J. *and* M. *married in community executed a will under which the survivor was appointed sole and universal heir.* J. *survived and continued in possession and acted as sole heir till his death.*

In 1887 J. *married* U. *under an ante-nuptial contract settling certain erven and furniture upon* U.

In 1895 J. *made a will bequeathing money and immovables to the children of the first marriage and certain property to* U., *and provided should any of the children attempt to upset the will they should lose all right thereunder.*

After J.'s *death the children instituted an action, as a result of which the 1886 will was declared invalid, and the Court ordered* J.'s *executors to pay over to* M.'s *estate her half of the joint estate as it was at the time of her death.*

The executors under the 1895 will claimed that those of the children who had caused the first will to be upset had forfeited all right under the 1895 will in view of the

penalty clause; and prayed the Court for a declaration of rights, urging that the defendants must make election between taking a half share of the estate of J. *and* M. *as it stood at* M.'s *death (as her heirs* ab intestato*) or taking under* J.'s *will of 1895.*

The Court held *that* J. *by his subsequent will having revoked his share in the 1887 will, and that as the effect of the judgment in the action on the earlier will was to declare that the mother had died intestate, this judgment did not affect* J.'s *subsequent will in any way; that the children who had brought the action were therefore not debarred under the penalty clause from claiming; and holding that all the beneficiaries of the will were not before it the Court declined to make any order as to the necessity for election.*

This was an action brought by the executors testamentary of the estate of the late Joseph Cross against the parties interested under the will to have their rights under the will declared.

Plaintiffs' declaration was as follows:

1. The plaintiffs are James Will, Edward Charles Cross, and Andrew Barclay Shand, secretary of the Eastern Province Guardian Loan and Investment Company, in their capacity as executors testamentary of the late Joseph Cross. The defendants are (1) Dan Victor Kannemeyer in his capacity as executor dative in the estate of the late Margaret Cross, the first wife of the late Joseph Cross; (2) Martha Ann Cross, formerly McDonald (born Urry), the surviving spouse of the late Joseph Cross; (3) John Joseph Cross, Edward Charles Cross, Richard Henry William Cross, Ernest Albert Cross, Arthur Cross, Charles Emmanuel Cross, Catherine Fanny Mathew (born Cross) duly assisted by her husband Thomas Mathew, Jane Lydia Harrod (born Cross) widow of the late Thomas Harrod, Caroline Harriet Callaghan (born Cross) duly assisted by her husband Hugh Broster Callaghan, children of the late Joseph and Margaret Cross; (4) executors testamentary of the estate of the late Reuben Ernest Cross, who was a son of the late Joseph and Margaret Cross and died in or about September 23, 1895; and (5) Edward Charles Cross in his capacity of father and natural guardian of his minor son.

2. On or about May 23, 1886, the late Joseph Cross and Margaret Cross married in community of property executed a document purporting to be their joint will and testament, whereunder the survivor was appointed sole and universal heir of all the estate and effects of the first dying and sole executor of the first dying's estate: [a copy of the said will was annexed].

3. In or about July, 1886, the said Margaret Cross died without having revoked or altered the said document or made any other testamentary disposition, and the said Joseph Cross continued in possession of the whole of the joint estate without taking out letters of administration or filing any account, as sole and universal heir until the day of his death.

4. In or about March, 1887, the said Joseph Cross married the defendant Martha Ann Cross, formerly MacDonald (born Urry), out of community of property, they having upon the 21st day of that month executed an ante-nuptial contract whereunder in consideration of the said marriage the said Joseph Cross agreed that after his death the said Martha Ann MacDonald should during her natural life and as long as she remained unmarried remain in the full, free, and undisturbed possession of certain two erven in the town of Adelaide, and of a certain farm called "Mimosa Park," then registered in the name of the said Joseph Cross and should have the usufruct of the said properties: he also settled upon the said Martha Ann MacDonald all the furniture, goods and chattels of the value of about £259 18s. specified in a schedule annexed to the said contract: [a copy of the said contract was annexed].

5. On or about June 27 1895, the said Joseph Cross executed his last will and testament whereunder he bequeathed certain sums of money and certain immovable property to the children of his first marriage, and also made certain bequests to his wife; amongst the said bequests he confirmed the dispositions of furniture and property made in the said ante-nuptial contract: [a copy of the said will was annexed].

6. He also bequeathed to the defendant Edward Charles Cross a life interest in the farm "Saxfeld Park," then registered in the testator's name, upon the condition that the said defendant pay all rates and taxes which shall become due theron and that should a son be born lawfully begotten to the said Edward Charles Cross then the said life interest should devolve to the said son; that upon the death of the said son the said farm should be sold, but should no son be born to the said Edward

Charles Cross then at his death the said farm should be sold and the proceeds should revert to the testator's general estate, and he further gave the said Edward Charles Cross the engines and pumps then upon the said farm on the beforementioned conditions.

7. He also bequeathed to the said Martha Ann Cross (formerly MacDonald) all the furniture belonging to him and his spider, pair of horses, and harness as her absolute property; also the dwelling-house occupied by him, the farm known as "Mimosa Park," the buildings known as Louw's Store and the house adjoining, and the sum of £100 annually upon the condition that should she marry again the said bequests should revert to his estate and that at her death they should so revert and upon other conditions not now necessary to specify.

8. The testator also directed by the said will that when his youngest grandchild born before his death should reach the age of eighteen years the residue of his estate of what kind soever should be divided in equal proportions share and share alike between all his sons and daughters and grandchildren born before his death who should then be living.

9. He further directed by the said will that should any of his sons or daughters at any time attempt in any way to upset any of the terms of the said will such son or daughter should lose any benefit whatsoever to which they might be entitled thereunder and he appointed the plaintiffs executors of the said will and administrators of his estate.

10. Thereafter on or about July 5, 1895, the said Joseph Cross died without having revoked or altered the said will and the plaintiffs took out letters of administration thereunder.

11. Thereafter on or about September 30, 1895, the defendants, children of the late Joseph Cross and his first wife Margaret Cross, excepting the said Edward Charles Cross, brought an action in this Honourable Court against the plaintiffs as executors in the estate of the late Joseph Cross, and against the defendant Kannemeyer, executor dative in the estate of the said Margaret Cross, to have the document purporting to be the last will of the said Margaret Cross declared of no legal effect as not having been executed in accordance with law, and for an order declaring that the executors of the late Joseph Cross's estate were bound to pay to the estate of the late Margaret Cross an amount equal to the present value of her share of the joint estate of herself and the said Joseph Cross, as the said estate existed at the date of her death: the plaintiffs crave leave to refer to the records of the said suit.

12. On or about November 30, 1895, this Honourable Court gave judgment in the said suit declaring that the said will was of no legal effect as prayed, and that the executors of the said Joseph Cross were bound to pay to the estate of the late Margaret Cross her half-share of the joint estate as the same existed at the date of her death.

13. The said Joseph Cross purported by his last will dated June 27, 1895, to deal with the whole estate of himself and his first wife, and had no knowledge up to the date of his death that the will of himself and his first wife of date May 28, 1886, was of no legal effect but on the contrary believed that he was the sole heir of his first wife's estate.

14. The plaintiffs are desirous of liquidating and distributing the estate of the said Joseph Cross in terms of his last will and according to the true and proper construction thereof, but the defendants object to the construction put upon the said will by the plaintiffs, and the proposed method of distribution, and it is necessary that the rights of the parties interested under the said will should be declared by this Honourable Court.

Wherefore the plaintiffs pray:

(*a*) That the rights of the parties to this suit under and by virtue of the said last will of the said Joseph Cross be declared by judgment of this Honourable Court and specially claim:

(*b*) That by taking action in this Honourable Court to have the said will of Joseph and Margaret Cross set aside the defendants, who were plaintiffs in the said suit, are now debarred from accepting any benefits under the said will and have no claim to anything save their shares *ab intestato* out of the said Margaret Cross's estate.

(*c*) That if this Honourable Court should be of opinion that such defendants have not already made their election, they and also the said Edward Charles Cross both for himself and on behalf of his minor son, and the executors testamentary in the estate of the late Reuben Ernest Cross are now bound to elect whether they will take a half-share of the estate of the late Joseph and Margaret Cross, as it stood at the date of the death of Margaret Cross, as her heirs *ab intestato* and renounce any benefits conferred by the will of Joseph Cross of date June 27, 1895, or will abide by the terms of that will considered as disposing of the whole estate of Joseph and Margaret Cross.

(*d*) That if the defendants elect to take under the will of June 27, 1895, they cannot claim any shares out of the estate of the late Margaret Cross.

(*e*) That in such case the bequest to the said Martha Ann Cross, formerly MacDonald, is of full force and effect.

(*f*) That the settlement upon the said Martha Ann Cross is a debt due by the estate and must be satisfied in priority to the bequests above referred to.

(*g*) That the Court may make such alternative order as in the premises may seem meet.

(*h*) Costs of suit.

The following were the pleas of the defendants E. Cross and Martha Ann Cross:

1. Edward Charles Cross personally and as natural guardian of his minor son and of the defendant Martha Ann Cross, two of the defendants in this suit, admit the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 of the declaration.

2. As to paragraphs 13 and 14, they crave leave to refer to the terms of the will dated June 27, 1895, as to the true construction thereof; they say that they agree with the plaintiffs that it is desirable that the estate of the said Joseph Cross should be liquidated and distributed according to the true and proper construction of his last will, and that it is necessary that the rights of the parties under the said will should be declared by this Honourable Court, but they do not as to the rest admit the allegations in the said paragraphs.

3. The defendant Edward Charles Cross, for himself, contends that he has done nothing to disentitle him, both to the benefits of succeeding as an heir *ab intestato* to his share of the estate of his mother and also to the benefits of succeeding both as a special legatee and as a residuary legatee under the last will of his father when his rights are declared by this Honourable Court; to whose judgment, subject to the aforesaid contention, he therefore submits himself and his minor son and prays to be held harmless in the matter of costs.

4. The defendant Martha Ann Cross says she has made and makes no claim in respect of the estate of the late Margaret Cross, and that her rights are to be determined by the ante-nuptial contract and by the will of her husband, which are annexed to the declaration.

5. She contends that the bequests to her under her husband's will are independent of any election which any of the other defendants may make and admits paragraph (*f*) of the prayers in the declaration herefore; subject to the aforesaid contention, she submits herself to the judgment of this Honourable Court, and prays to be held harmless in the matter of costs.

The following was the plea of the defendants other than Martha Ann Cross, Edward Charles Cross, and the executors of the late Reuben Cross.

For a plea to the declaration the said defendants say as follows:

1. They admit the allegations contained in the paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12 and 14 of the declaration.

2. As to the 6th paragraph they say that the allegations therein contained have no bearing upon the matters at issue between the parties in this case.

3. As to the 11th paragraph they say that the late Reuben Cross was no party to the action referred to, but in other respects they admit the allegations in the said paragraph.

4. As to the 13th paragraph they refer this Honourable Court to the last will of the said Joseph Cross to ascertain the assets which the said will purported to deal with. As to the other allegations in the said paragraph they refer this Honourable Court to such proof as the plaintiffs may produce in the premises.

5. The joint estate of the said Joseph Cross and Margaret Cross, at the death of the latter, was of the value of £24,000 or thereabouts, and the property left at the death of the said Joseph Cross including the said joint estate was of the value of £27,000 or thereabouts. All the landed property left at the death of the said Joseph Cross, and dealt with by his last will formed part of the joint estate of himself and first wife.

6. The defendants submit that they are not debarred in the premises from accepting benefits under the last will of the said Joseph Cross and that they are not bound to elect whether they will take a half-share of the joint estate as it stood at the death of the said Margaret Cross, or whether they will abide by the last will of the said Joseph Cross, but that they are entitled to claim their inheritance as heirs *ab intestato* of the said Margaret Cross, and also to enjoy any benefits conferred upon them by the will of the 27th June, 1895.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

The replication to the plea of Edward Charles Cross and Martha Cross was general.

On these pleadings issue was joined.

Mr. Searle, Q.C. (with Mr. Buchanan), for the plaintiffs.

Mr. Innes, Q.C. (with him Mr. Tredgold), for all defendants other than Mrs. Cross and Edward Charles Cross.

Mr. Schreiner, Q.C. (with him Mr. Castens), for Mrs. Cross and Edward Charles Cross.

[By consent this case was argued upon the pleadings without witnesses.]

Mr. Searle referred to *Lucas* v. *Hoole* (Buch. 1879 p. 132); *McMunn* v. *Powell's Executors* (6 Sheil, 65); *Klopper* v. *Smit* (9 Juta, 167); *Cooper* v. *Cooper* (7 L.R., Eng. and I. App. 53); *Grissel* v. *Swinhoe* (7 L R., Eq. 291); *Williams on Executors* (p. 1,304, Vol. II., Pt. 3, Bk. 3, section 9); *Jarman on Wills* (Vol. I., Chapter 14, p. 415); *Filok* v. *Filok* (7 Equity, 494). We say the testator purported in the 1895 will to deal with the whole estate—that there must be an election—and that the necessity for election applies in the intestacy as much as in any other case. Apart from the ordinary principles of common law the parties have actually chosen their shares in intestacy by their action in the last case (*Cross* v. *Cross's Executors* 5 Sheil, 459). The election of one does not bind the others. As to the wife there is no election in her case. She is clearly entitled by her contract to certain property.

Mr. Innes referred to *Wright* v. *Wright's Executors* (5 Searle, 347); *Jarman on Wills* (Vol. II., page 902). We contend that we are not bound to elect. In *McMunn's case* it was laid down that the necessity for election must be absolutely plain *ex facie*. The same principle holds in English law: *Jarman* (p. 425). Only in regard to the land could there be any election. But half the land and half the joint estate can be claimed by the executor of the first Mrs. Cross. Supposing the law were as claimed by plaintiffs' how could the property be made to be given up to persons who are not heirs *ab intestato*. Whichever way we elect the matter will not be settled.

Mr. Schreiner: As to the question of bequeathing property belonging to testator and another in common, see *Voet* (30, 32, 1, 28); *Van Leeuwen* (Cens. For. III, par. 25. p. 114); *Van der Merwe* v. *Van der Merwe's Executors* (Buch., 1877, p. 89); *Goedhal's Case* (5 Sheil, 377); *Watson* v. *Burchell* (9 J., 2); *Vinnius* (*Quæst. Jur.*, Bk. II., 226).

C.A.V.

Postea (September 8).

Judgment was delivered in this case.

The Acting Chief Justice said: Certain of the defendants in this case, children of the late Mr. Cross and of his first wife, instituted an action after the death of their parents to have the joint will of their late father and mother, in so far as it related to their mother's estate, declared null and void, on the ground of want of due attestation. Judgment was given in their favour, and this Court at the same time declared that the executors of the father's estate were bound to pay to the estate of the mother her half of the joint estate, as the same existed at the date of her death. That judgment still stands. A subsequent will made by the father after the death of the mother, of which will the plaintiffs are executors, contained this clause, "I further declare my will and desire to be that should any one of my sons and daughters at any time attempt in any way to upset any of the terms of this will, then and in that case such son or daughter shall lose any benefit whatsoever to which they may be entitled under this will." The plaintiffs now contend that those of the children who took action to set aside the will of their late mother are debarred from claiming under their father's last will. The decision of the Supreme Court in the case of *Wright* v. *Wright's Executors* (5 Searle, 347), supports the view that it would be straining the natural construction of the clause to extend its application to the will of the wife. The full Court held in that case that an heir testing the validity of a codicil made by the testator did not incur the penalty of disherison under the testator's will. The leaning against penalty clauses of this nature is shown by the decision of the Master of the Rolls in the old case of *Powell* v. *Morgan* (2 Vernon, 90), referred to by the then Chief Justice, where it was laid down that no forfeiture would arise if a will was disputed, provided there was *probabilis causa litigandi*. In *Wright* v. *Wright's Executors*, Bell, J., was of opinion that the clause should be strictly construed, and the words "this will" limited to the instrument in which they were used. In the case before us the testator himself had revoked his share in the former will, and no testamentary writing by the testator was ever attacked by the children. All that the children asked, and what the Court granted, was a declaration that their mother had not executed any will. This declaration may or may not have the effect of altering the disposition of property made by the testator in the subsequent testament, but so far his will stands unimpeached. On this issue therefore the plaintiffs have failed. The main contention in the case is the plaintiffs' claim to put all the children to an election either to take a half share of the joint estate as it stood at the date of the death of their mother, as her heirs *ab intestato*, and renounce any benefits conferred by the last will of the testator; or to abide by the terms of that will, considered as disposing of the whole of the joint estate. It has been repeatedly pointed out that the principles of equity upon which the doctrine of election is founded, though not the name, are known to the civil law. The object of our Courts has always been to carry out as far as

can be done the intentions of the testator, where adverse rights are set up by the parties interested. But the notable feature in this case is, that there is no contest between different classes of heirs. All the parties specifically benefited by the testator's will make common cause in opposing the claim set up by the executors. The Court has already decided that half of the estate, which includes the landed property, belongs to and must be paid over to the executors of the first wife; and the widow, who joins the children as a co-defendant, pleads specially that she makes no claim in respect of that estate. Now, to ascertain the intentions of the testator, it is fundamental principle of law that we must look primarily and mainly to the testament in which those intentions are expressed. *Voet* (30, 31, 32, section 28) has been cited in favour of the presumption that a testator must be taken to be disposing only of his own property. In his judgment in the case of *Watson* v. *Burchell* (9 Juta, 6), the Chief Justice summarised this passage as follows: "*Voet* points out the difference between the legacy of a thing which does not belong to the testator at all and the legacy of a thing of which he is tenant in common with another. In the latter case he holds that the legatee, in case of doubt, is entitled only to the share which belonged to the testator; and he adds, apparently with approval, that according to some, the same rule of construction applies where a spouse bequeaths a thing which forms part of the common estate of himself and the other spouse." As was pointed out by the same learned judge in the recent case of *McMunn* v. *Powell's Executors* (6 Sheil, 65), it must appear on the will itself, by plain demonstration or by necessary implication, that the testator disposed of property not his own. Turning to the will in this case we find, unlike McMunn's will, it does not contain any recitals showing that the testator intended to deal with any property not his own. It is admitted that so far at all events as the pecuniary bequests are concerned, there is nothing in the will inconsistent with an intention that they should be paid out of his separate estate. These bequests amount to but a portion of his estate, which it is common cause is of the value of £15,000. It is only when landed property is mentioned that his intention is in dispute. If we are permitted to go outside of the will, and look at the dispositions of the joint will, which has been declared invalid and his share of which the testator himself revoked, a stronger case against the heirs might be made out. But it is a question whether the Court would be justified in adopting such a course. Here, however, the difficulty is removed by the fact that the persons to whom this landed property is specifically bequeathed are prepared to take so much of it only as belongs to the testator's estate. It is in respect of the residuary estate only that any question of election can arise. As to the landed property not specifically bequeathed, the will directs that the executors shall within a reasonable time, and at their discretion, sell the same and invest the proceeds. The Court has already awarded one-half of that property to the executors of the first wife, and the plaintiffs, as executors of the testator, can therefore deal only with the other half. The testator has bequeathed the residue of his estate, which includes the proceeds of this landed property, equally among his children and grandchildren who may be alive when the youngest grandchild born before the testator's death shall reach the age of eighteen years. It is uncertain who may ultimately be entitled to claim this residue, and the Court cannot now determine whether or not any election will have to be made when the time of distribution arrives. Under all the circumstances I am of opinion that the claims of the executors of the testator must now be refused. Judgment will be for the defendants with costs.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon said: The plaintiffs in this case are the executors testamentory of the late Joseph Cross, who died on July 5, 1895, leaving a will, which had been executed on June 27, 1895. Previous to this the said Joseph Cross and his wife Margaret Cross, married in community, had on May 28, 1886, executed a document, purporting to be their joint will, whereunder the survivor was appointed sole and universal heir of all the estate and effects of the first dying and sole executor of the first dying's estate. In July, 1886, Margaret Cross died, and after her death Joseph Cross remained in possession of the whole of the joint estate. In March, 1887, he married the defendant, Martha Ann Cross, by ante-nuptial contract, in which he settled certain property upon her. On June 27, 1895, he executed his last will and testament. On September 30, 1895, an action was brought in this Court by certain of the children of Joseph Cross and his first wife to have it declared that the document purporting to be the last will and testament of Margaret Cross was of no legal effect, and for an order declaring that the executors of the late Joseph Cross's estate were bound to pay to the estate of the late Margaret Cross an amount equal to the present value of her share of the joint estate of herself and the said Joseph Cross, as the said estate existed at

the date of her death. On November 30, 1895, the Court gave judgment, declaring that the said will was of no effect, and that the executors of the said Joseph Cross were bound to pay to the estate of the late Margaret Cross her half-share of the joint estate. Under that judgment of the Court the duty of the executors of the estate of Joseph Cross was clear, viz., to divide the joint estate into two portions, to hand over the one portion to the executor dative of the estate of the late Margaret Cross for distribution in her intestate estate, and then to proceed to deal with the remaining portion in terms of the will of Joseph Cross. The executors, however, feel some difficulty about carrying out this order and now come to the Court for further directions with regard to the distribution of the joint estate which is in their hands. And in the first place they ask the Court to declare that those of the defendants who are plaintiffs in the suit to set aside the will of Margaret Cross are now debarred from accepting any benefits under the will of Joseph Cross, and can only claim their shares *ab intestato* out of the estate of Margaret Cross. This claim is based upon this provision in the will: "I further declare my will and desire to be that should any one of my sons and daughters at any time attempt in any way to upset any of the terms of this will, such son or daughter shall lose any benefit whatsoever to which they may be entitled under the will." This provision is a highly penal one, and in accordance with the ordinary rules of construction must be strictly construed. That being so, it seems to me impossible to hold that the sons and daughters, by bringing an action to have it declared that their mother's will was invalid, had attempted in any way to upset the terms of their father's will. Even though indirectly the effect of the judgment in that suit may have been to interfere with some of the provisions of the father's will, that fact in itself cannot in my opinion bring their action within the strict terms of the penal clause. Whether in any event, even if the defendants had brought themselves within the terms of the penal clause, the Court would decree a forfeiture except in a suit brought by persons who were beneficially interested under the will, is a point which seems to me open to argument, but upon which I express no opinion at present. The plaintiffs, in their next prayer, claim that the sons and daughters of the late Joseph Cross are now bound to elect whether they will take their shares *ab intestato* out of the estate of the late Margaret Cross, and renounce any benefit conferred upon them by the will of Joseph Cross, or will abide by the terms of that will considered as disposing of the whole estate of Joseph and Margaret Cross. Have the plaintiffs then any right to make a claim of this nature upon the defendants? If in this action some person or persons beneficially interested under the will of Joseph Cross were dissatisfied with the proposed distribution of the joint estate as ordered by the judgment of the Court, and had called upon the heirs *ab intestato* of Margaret Cross to make their election, then clearly it would be necessary for the Court to determine whether this was a case in which the doctrine of election should be applied. But so far from that being the case, we find that all the beneficiaries under the will who are represented in this suit (the sons and daughters, who are living, the representative of Reuben Cross, deceased, the widow of Joseph Cross, and the only grandchild who is a party to the suit) are quite satisfied that the joint estate should be distributed in accordance with the judgment of the Court. The only other persons who are beneficially interested under the will are those grandchildren who were living at the date of the testator's death, and who may be still living at the time when the youngest grandchild shall reach the age of eighteen years. The grandchildren are not represented in this suit, nor have we any information before us with regard to them. How many there may be, whether any of them are majors, what their ages are, and how long it will be before the youngest reaches the age of eighteen years, are all questions upon which we have no knowledge. One thing, however, is clear, and that is that there is nothing before the Court to show that any of them are at present dissatisfied with the proposed distribution of the property under the judgment already referred to. Nor do I think that we can assume as a matter of course that there would necessarily be any objection to this distribution on the part of those of them, if any, who may reach the age of majority. I can quite imagine, taking the very peculiar provisions of the testator's will into consideration, that they may prefer that the joint estate should be distributed in this manner instead of being dealt with solely in terms of that will. The case therefore stands thus: that none of the beneficiaries under the will have called upon the heirs *ab intestato* of Margaret Cross to elect; but that the claim is made by the executors of Joseph Cross, who have no beneficial interest under the will, and who have no authority to speak on behalf of any of the beneficiaries. Now, I can find no case in which the doctrine of election has been applied by the Court except at the suit of disappointed beneficiaries, nor on principle do I see how it could

be otherwise applied. It matters not, as far as I can see, whether the principle on which the doctrine of election proceeds is forfeiture or compensation. The more recent English authorities, according to *Williams on Executors*, seem to establish that compensation only is to be made. In the case of *Rogers* v. *Jonas* (3 Ch. D., 688) the late Master of the Rolls said: "The doctrine of election is this: that if a person whose property a testator gives away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives." That certainly seems to be the more equitable rule; and if that principle is to prevail it cannot admit of any doubt that an election could only be decreed at the suit of a person seeking compensation. According to the notes, however, in *Dillon* v. *Parker*, which were referred to with approval by the Chief Justice in the case of *Lucas* v. *Hoole*, it is stated that the effect under the civil law of election to take in opposition to the will was forfeiture of the benefit offered by it. The question, however, has never as yet, I believe, been directly raised in this Court; but even if it should be held that under our law a person electing to keep his own property forfeits all benefits under the will, I cannot see how a forfeiture can be decreed where there is no disappointed beneficiary under the will claiming that an election should be made. For if that were not so, we might have the case of the Court ordering an election, and possibly decreeing a forfeiture, and it might then subsequently transpire that this order was made in direct opposition to the wishes of all parties interested in the property. When such a person appeals to the Court, it will be time enough to consider whether the defendants in this case should be forced to make their election: but, in the meantime, I see no reason why the children of the testator should not be entitled to receive their shares *ab intestato* in their mother's estate, and at the same time claim any benefits conferred upon them under their father's will. In the view which I have taken of the case it becomes unnecessary to consider several other points which were raised in the course of the argument. The executors, who have come to the Court for further directions, should, in my opinion, be instructed simply to carry out the previous judgment of the Court of Nov. 30, 1895.

[Plaintiff's Attorney, Messrs. Tredgold, McIntyre & Bisset; Attorneys for Martha Cross and Edward Charles Cross, Messrs. Reid & Nephew; Attorneys for all the other defendants, Messrs, Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

REGINA V. J. R. VAN HUYSTEEN. { 1896. Sept. 2nd

The Acting Chief Justice referred to two cases which had been tried by the Resident Magistrate of Knysna. In the first case the accused was charged with contravening section 37 of Act 4 of 1892, in that by means of false pretences, he induced William Jones, postmaster of Plettenberg Bay to give to him certain two letters not addressed to him, but to the widow Van Huysteen. It appeared that prisoner went to the post-office, when the postmaster asked prisoner if the lady to whom the letters were addressed, Mrs. Van Huysteen, was at home. Prisoner replied that she was, whereupon the postmaster handed prisoner the two letters. As a fact Mrs. Van Huysteen had removed elsewhere. Upon this charge the accused was convicted and sentenced. A second charge was then brought charging the prisoner with having opened one of the letters, abstracting a P.O. order for £2, and afterwards falsely stating that he was the legal payee, and attempting to cash the same and so commit the crime of theft. The Magistrate convicted the prisoner on second charge and sentenced him to a further term of three months' imprisonment, after the expiration of the former sentence. No evidence was taken on the second charge upon which the prisoner was arraigned. The proceedings were in this respect most irregular. As there was no evidence to support the second charge, this conviction must be quashed.

REGINA V. GERT VAN STADE AND OTHERS.

Mr. Justice Solomon mentioned this case, which had come before him. This was a case in which three prisoners were charged with stealing a certain quantity of wool and mohair, the property of Messrs. Leopold Abt & Co., shopkeepers, Carnarvon. The case was tried by the Resident Magistrate of Carnarvon, and Gert van Stade, one of the prisoners, was sentenced to six months' imprisonment with hard labour, the other two prisoners being acquitted.

Mr. Justice Solomon said the proceedings in this case appeared to have been grossly irregular. The Resident Magistrate seemed to have acted upon the principle that the onus lay upon the accused person to establish his innocence,

Before any evidence was called for the Crown, upon an admission made by the prisoner's agent, the evidence of the prisoner and his witnesses was heard in proof of his innocence, and then what was called rebutting evidence was taken on behalf of the prosecutor. It was true that the evidence called for the Crown was sufficient to establish that the prisoner was guilty of the theft of one bag of wool belonging to Messrs. Abt & Co. The charge against the prisoner of which he was convicted was the theft of a certain quantity of wool and mohair, the property of Messrs. Abt & Co. He could find no evidence that Messrs. Abt & Co. had lost any mohair, but only five bags of wool. Whether the Resident Magistrate found the prisoners guilty of the theft of one or five bags of wool did not appear. He was always indisposed to interfere with a conviction if the evidence established the prisoner's guilt, merely on the ground of some irregularity in the proceedings. But a line must be drawn somewhere, and in this case the proceedings were so utterly opposed to all the established principles of criminal practice, and moreover the charge as laid had not been proved to its full extent, that he was not disposed to overlook the irregularity in this instance. The rebutting evidence might have been enough to find the prisoner guilty of the theft of one bag of wool, but the Magistrate found him guilty upon the charge as set forth in the charge-sheet. He thought this was a case in which there had been gross irregularity. The charge had not been made out, and the conviction would be quashed and the sentence set aside. The papers had been before the Attorney-General, who was not prepared to support the conviction.

VAN DE WALL v. VAN DE WALL'S EXECUTORS. { 1896. Sept. 2nd.

Will—Codicil—Reservatory clause—Specific reference—Holograph will—Privileged will—Division among all children—Witnesses.

V. *made a will containing the reservatory clause. Subsequently he added a codicil, in terms of which one of his children was to get a certain benefit "as co-heir."*

The codicil was in his own handwriting and referred to the will, but there was no actual mention of the reservatory clause and there were no witnesses. V. *had other children besides the one named in the codicil.*

The Court held that *as there was no special reference in the codicil to the reservatory clause and as the property was not divided by it among all the children, and therefore the document could not claim to be privileged, the codicil was invalid.*

This was a special case to decide the validity of a codicil brought by Rutger Henry van de Wall against the executors testamentary of the estate of G. van de Wall.

The special case was stated thus:

1. The plaintiff resides at and is the son of the late Gillies van de Wall, hereinafter called the testator, of whom the defendants are the executors testamentary.

2. On the 1st November, 1892, the testator duly executed his last will, in terms of which:

(*a*) He bequeathed as a prælegacy to his daughter Johanna, who is one of the plaintiffs, the sum of £80 sterling.

(*b*) He instituted as sole and universal heirs his three daughters: (1) Johanna Hendrika, widow of the late A. J. D. Gordon and one of the defendants; (2) Hendrika Beyer, married to Servaas de Kock; (3) Gertruida, married to Dr. Pieter Moll; and that of all property to be left at his death of every description to be fully enjoyed by them. And in the case of the predecease of one or more of the said daughters, he substituted their lawful descendants in their stead.

(*c*) He appointed the defendants to be executors under his will.

(*d*) He reserved for himself the power to alter his will (with the exception of the institution of heirs) as he might deem fit, either by separate act or at the foot thereof, desiring that all such alterations as are made and ratified by his signature shall be considered as therein veritably inserted. The remaining provisions of the said will are not material for the present case.

3. On the 3rd April, 1893, he wrote with his own hand and signed on a blank page of the said will a codicil, of which a translation is hereunto annexed, in which he directed that should the portions bequeathed to his daughters exceed the sum of £900 for each of them he desired that his son Rutger Henry (the plaintiff) should step in as co-heir in equal portions of whatever his estate should further yield.

4. The portions bequeathed to the daughters in aforesaid will exceed the sum of £900. The plaintiff contends that the provisions of the said codicil above quoted are valid, and that he is entitled thereunder to share in equal portions with his three sisters aforesaid in so much of the testator's estate as may remain after his said sisters have each received the sum of £900 under the said will.

The defendants contend:

(*a*) That inasmuch as the codicil does not purport to be made under the reservatory clause contained in the will it is null and void.

(*b*) (If the above contention be found insufficient) That the codicil purports to appoint the plaintiff an heir while excluding other children of the testator, and that therefore the plaintiff's contention is bad in law.

Wherefore the parties pray for judgment upon their respective intentions, or that this Honourable Court may declare the rights, if any, of the plaintiff; and they pray that the costs may be directed to come out of the estate of the testator.

The codicil written on the back of the will was as follows:

"In further explanation and in addition to this my last will I wish the following to be observed by my executors:

1. Should the portions bequeathed to my daughters in this testament exceed the sum of £900 for each, I desire that my son Rutger Henry shall step in as co-heir, in equal portions of whatever my estate may further yield.

2. It is my desire that the portion which falls to my daughter Hendrika Beyer, married to Servaas de Kock, shall be made *fidei-commissum*. In case however of the predecease of her husband, this portion shall be paid out to her.

3. I hereby appoint my eldest son Rutger Henry co-executor.

G. VAN DE WALL."

Mr. Innes, Q.C., for the plaintiff. We admit that codicils must be made by virtue of the reservatory clause and purport to be so made. All the old writers take this for granted. Here the testator writes on the actual document of the will itself. He doesn't specifically purport to make this writing his codicil in virtue of the reservatory clause. But he refers to the will which contains the reservatory clause; this is substantially a reference to the reservatory clause. If there is no reservatory clause in the will a codicil, not a holograph one, must be witnessed. No special set form of words is required; the reference to the will includes that to the reservatory clause. There is sufficient reference. Assuming that the codicil was made validly under the reservatory clause the next question is, can a testator by an otherwise valid codicil institute an heir? *Nelson* v. *Currey* (4 Juta, 355) says the tendency of our law is to do away with the old Roman-Dutch distinction between legatees and heirs, between codicil (based on reservatory clause) and will in that respect. See *Van der Keessel* (*Thes. Selectae*, 337). The word "heir" is used in the codicil, but the intention and net result is to create a fund, being a balance over £2,700, to be divided among four persons called heirs but really legatees. A legacy may of course be left in such codicil. *Bynkershoek* (*Quæs. Priv. Jur.*, Bk. III., Ch. 5); *Wylde's Will* (Buch. 73, p. 13). Is this a holograph testamentary document which the Court would uphold without witnesses being required? See *Steer's Case* (5 Juta, 313); *Eaton's Case* (Buch. 75, p. 173); *In re Herbert* (11 Juta, 105). It has never been decided whether a father can benefit *some* children only under a holograph will. If Van de Wall had written his own will dividing all property *inter liberos*, it would of course have been valid. Now the Roman-Dutch law did not require for the validity of the holograph will that the heirs should be instituted heirs in equal portions: *Voet* (28, 1, 15.) The principle of unequal institution in a holograph will being admitted, where does it stop? For the legitimate portion is now abolished, and even when it existed it was not the basis of the principle. *Voet* based the privilege on the wish and will of the father to benefit his children.

Mr. Schreiner, Q.C., for defendant: For such a codicil to be valid, there must be something *ex facie* the codicil showing that the testator expressly had the reservatory clause in his mind. In the *Hollandsche Consultatien* (Pt. I., 154) it is laid down that where there is special reference to the will the codicil is just as good as if inserted. See *Van Leeuwen Censura Forensis* (Pt. I., 322) and *Voet* (29, 7, 5). The first contention of plaintiff falls away—as testator evidently never thought of the reservatory clause. As to the second the document is admittedly a codicil. But there is no authority for saying that a *codicil* can have the privileges of a privileged *will*. *Voet* (28, 1, 15) only refers to wills. There is no such thing as a privileged *codicil*; there are no authorities or Supreme Court cases holding that there are. De Wet's and Eaton's cases are on *wills* only. Though the Court has held itself bound by Eaton's case, yet it will not extend it at all - especially to an informal document. The basis of the privileged will is the Roman idea of the rights of *sui heredes*. Now the Statute has given free liberty of testation, and there is no rational basis for privileged wills. Eaton's case *has* been followed since the Statute (Act No. 23 of 1874), but will not be extended. But it was never intended that the father could select one child and give all to him. A privileged will, if anything, must be equitable. There is no reason for exemption from the requirements of Ordinance 15 of 1845. I must admit that if the Court finds the codicil was made under

the reservatory clause our case falls. It cannot be distinguished from Sir John Wylde's will. But Wylde's clearly made the required reference. See *Voet* (28, 1. 29.)

Mr. Innes: See Decker's note on *Van Leeuwen's Roman Dutch Law* (Vol. I, p. 315, Kotze's Trans.). The word "heir" is loosely used in this codicil. The reference to the reservatory clause need not be formally made. The intention is the great thing. If the law allowed a father to make a will privileged (where seven witnesses were required)—surely the greater includes the less; and the codicil being formerly required to be far less formal (five witnesses only being required) could be a privileged one. The basis of the privilege was not the *sui heredes* theory, but natural love and affection. Law required less proof of child's right than of right of strangers.

The Court found for defendants, and declared the codicil invalid; costs to come out of the estate.

The Acting Chief Justice: Since the Ordinance 15 of 1845 it has been the clear law of the Colony that no will or other testamentary writing of any kind can be held to be valid by the Court unless duly executed in the way prescribed by the law, viz., that it must be signed by the testator in the presence of, and also signed by two witnesses present at the same time, and subscribed on every leaf of the will or other testamentary document. Since that Ordinance was passed it has been established by decisions of this Court that certain exceptions exist. But unless it is shown that the alleged testamentary writing can clearly be brought within any such exception that we should uphold the law as laid down by the Ordinance. In this case the testator made a will, and on the fly-leaf of the will he wrote the document now in dispute. This document certainly does not come within the Ordinance, as it is not witnessed or otherwise properly executed. But it is contended that it can be supported under two exceptions to the statutory provisions of our law, viz., that it was a codicil executed by virtue of the reservatory clause in the will, and that it was a privileged holograph testamentary disposition. Where it is sought to an unwitnessed instrument like this validity under the reservatory clause the onus is on the party seeking to support the document to prove incontestably that it was executed under and by virtue of such reservatory clause. Here the reservatory clause in the will allows the testator to execute at the foot thereof any alteration with the exception of the institution of heirs. Now, in the first place, this document does not purport to be executed under the reservatory clause; and, secondly, it attempts to do the very thing which the reservatory clause says shall not be done, namely to institute a co-heir. The question of codicils executed under the reservatory clause was discussed in the case of *Nelson* v. *Currey*, and the law is thus concisely summed up by the Chief Justice: "All the writers whom I have consulted are agreed that the reservatory clause in a will cannot confer validity on a subsequent testamentary instrument unless that instrument is incontestably proved to have been executed by the testator, and unless it purported to be and was executed under and by virtue of the reservatory clause in the will." I think that the *dictum* in that judgment should be followed in this case. This document cannot be treated as a codicil in view of that decision; and on this ground I am inclined to decide in favour of the defendants. On the second ground, that this is a privileged testament, all the cases that have been cited show that where a privileged will of a parent has been supported it has been where the property has been distributed amongst all the children, not necessarily equally, but amongst all. In this case the document only affects certain of the children, and moreover institutes a fresh heir not named in the will. On both grounds, therefore, I think we ought to hold that the defendants have succeeded in their contention in this case. The writing in question will be declared invalid. Both parties have agreed that the costs shall come out of the estate. I think it was a fair question to bring before the Court, as it would have been impossible for the executors safely to administer the estate until the question had been decided.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. Reid & Nephew.]

LOUW'S EXECUTORS v. LOUW AND OTHERS. 1896. Sept. 2nd.

Mr. Schreiner, Q.C., appeared for the plaintiffs; Mr. Jones for the defendants.

This was a special case for a declaration by the Court as to the rights of the defendants under the will of the testatrix.

After argument

The Court gave judgment for the plaintiffs' contention, costs to come out of the estate.

MOETSI v. SEPTEMBER. 1896. Sept. 2nd.

False imprisonment — Malice — Reasonable and proper cause.

S. *was arrested on a charge of stealing a sheep belonging o* M. *The loss of the*

stock was reported by M. *in due course to the headman of the location, who reported to the inspector. The latter sent for the police, who arrested* S. *with others; one of whom had acknowledged his guilt and charged* S. *with being an accomplice.*

S. *was acquitted and brought an action for damages for false imprisonment against* M. *before the Resident Magistrate and obtained judgment, for £10. On appeal,*

The Court held *that there was no proof of malice or want of reasonable and proper cause on part of the appellant and upheld the appeal.*

This was an appeal from the decision of the A.R.M. of Klipdam in a case in which the appellant was defendant and September plaintiff, in which an action was brought for false imprisonment. The A.R.M. gave a verdict for damages £10 and costs. Against this decision appeal was now made.

Mr. Schreiner, Q.C., for appellant.

Before the Resident Magistrate,

Isaac September stated: In October, 1895, I was imprisoned in the lock-up, at Klipdam, on a charge of theft of a sheep. Defendant gave me in charge. On the morning of my arrest the defendant spoke to me—this was before the police came. He asked me for a sheep, saying that I had stolen one of his. Subsequently I was sent for by the defendant and I went to his house. Banani, the headman of the location, was with him. When I got there, they told me to wait until the other boys came to speak about the stolen sheep: I did so. Afterwards two policemen came there to the location. Defendant was not then present. The police asked me where defendant was. I said at his house. They left me and went to him, but returned with defendant and another man. Defendant then pointed me out to the police, who arrested me in defendant's presence. Two other men were also arrested with me at defendant's request. Defendant spoke to me and took me twice to the headman before my arrest. The headman called me and inquired into the matter. I don't know that defendant went to the police. The police came by themselves, but the defendant brought them to me. When the police arrived first defendant was not with me, but both defendant and headman were sent for. I cannot say that I was arrested at any particular person's request, nor do I know who sent the police. If Mr. Hall had sent them to arrest me he must have done so at defendant's request or on his report. Cases of theft are reported to the headman. I don't know whether defendant reported this case to the headman. Some persons who were convicted of theft did return to the location.

William Herbert Hall, sworn, states: I am Inspector of Locations. In cases of theft, &c., the first report is made to the headman. I remember him reporting the case of the *Queen v. Izaak September and others* for theft. Present defendant had complained that a sheep of his was stolen. The headman gave me such particulars as he could gather, whereupon I made a full report to the police at Rutland, at the same time giving the names of the persons said to be implicated. The police immediately went to the location and made the arrests, taking into custody those complained of. The police acted upon information I gave them. The headman stated to me that he had inquired into the case reported by defendant. He knows nothing more than what was reported to him by defendant. I did not direct the arrest of the offenders in my letter to the police, nor did I take any written statement of the case.

Moetsi swore that one of the persons arrested (who had since died) had stated September was one of the thieves, and that this was the reason why he had mentioned September's name to the headman.

The Resident Magistrate's reasons for judgment were as follows:

On the 2nd November, 1895, a case was heard by me in which the present defendant charged plaintiff with theft of a sheep. With plaintiff were included in the same charge four other natives. All these including present plaintiff were discharged. In the criminal case on being cross-examined the complainant stated: "The others (in whom plaintiff was included) did not leave the kraal that day, but he suspected them because the prisoner Piet had implicated them in having partaken in the eating of the head." But he (complainant) went on to say that he knew none of the implicated prisoners were away from the kraal, and as it is clear that the sheep was killed and roasted in the veld and from the evidence of Samuel Moetsi the sheep was eaten in the veld where he stated he found the bones, plaintiff could not have eaten of the head, and even if he did this it was in itself no charge.

Now in the civil case it is positively sworn that the defendant pointed out the plaintiff as one of the criminals. The headman states that Mr. Hall, the Inspector, gave authority to arrest the plaintiff and others. Mr. Hall denies this. The defendant's evidence is contradictory

and I place no reliance therein. On the contrary, I have no hesitation in believing that defendant pointed out the plaintiff as one of the men who had stolen his sheep.

The question seems to me "Had he reasonable grounds for doing this?" The defendant knew that the plaintiff was not in any way implicated in this theft, and yet he gives him in charge. Upon what ground did he do so?

The answer can only be on the unsupported evidence of a supposed accomplice, notwithstanding the fact that he (defendant) knew the accomplice was saying what was untrue.

Considering the fact that plaintiff was some days in gaol, taken away from his home some thirty miles and cattle left to stray, I am of opinion that the judgment was a reasonable one.

The Court held that in this case there was no evidence of malice nor want of reasonable and proper cause for what the defendant did. In the absence of this the Magistrate certainly erred in his judgment. The appeal would be allowed with costs, and judgment in the Court below would be given for the defendant with costs.

[Appellant's Attorney. D. Tennant, jun.]

BEZUIDENHOUT V. KOK'S EXECUTOR.

Mr. Schreiner, Q.C., appeared for the appellant; Mr. Graham for the respondent.

This was an appeal from the decision of the Resident Magistrate of Kokstad in an action brought by the respondent against the appellant as defendant to compel transfer by the defendant of a certain farm registered in his name and held by him. The plaintiff was executor dative to Adam Kok. The summons set forth that on August 17, 1875, the farm was sold for £100. Appellant denied that he had received any consideration for the farm. The Magistrate gave judgment compelling specific performance and transfer. Against this decision appeal was now made.

After argument,

The appeal was dismissed with costs.

The Acting Chief Justice: At the time when the agreement was entered into, upon which this case is based, Griqualand West was not attached to the Colony, but its government was carried on in a loose way under the Chief Adam Kok and his Council. Mr. Brisley, an educated man, who was secretary to Kok, gave evidence in this case, and the Magistrate relied very strongly upon his evidence, and certainly Mr. Brisley does not seem to be an interested party in the case. From this evidence it appears that in 1875 the father of the appellant, Rev. Mr. Bezuidenhout, entered into a contract with Adam Kok, promising to give him the farm in dispute in settlement of a debt of £300 or £400. The farm had been promised to the son, and he agreed to this sale. The first objection raised that there was no consideration for the contract is therefore disposed of. The second part of the agreement says that Captain Kok promised, if possible, to give Bezuidenhout a piece of land adjoining the 100 acres which he had bought. The Magistrate has gone into the case at great length, and finds that that promise has been carried out and a grant subsequently made far in excess of what was promised in the agreement. Kok died in 1875, and the executors administered the estate. These executors, in 1876, advertised Kok's property very extensively, and amongst other property, the farm given by old Bezuidenout was sold, all the parties knowing of it, and allowing the sale to go through. Afterwards in 1883, a title was granted by the Colonial Government to the farm bought by Kok, under which the property is now held, and it is upon this title that the plaintiff wishes to have transfer. The Magistrate decreed specific performance, and the Magistrate, in ordering transfer to be given, only followed precedents which have frequently been made in this Court. In confirmation of the *bona fides* of all the transactions, we have the fact that as far back as 1880, five years after the contract was entered into, Mr. Brisley, who had the confidence of these people, obtained from Willem Bezuidenhout a declaration of sale of this property to Kok, and also obtained a power of attorney to transfer it. Moreover, possession was given up and the purchasers were allowed to have possession, and have been in possession now for twenty years or upwards. The Magistrate has found, and I think on sufficient evidence, that there is consideration, and that his part of the contract was performed by Kok. The appeal is dismissed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Reid & Nephew.]

SASSIN V. BRAUER.

Mr. Graham appeared for the appellant; Mr. Searle, Q.C., for the respondent.

This was an appeal from the decision of the Assistant Resident Magistrate, Cape Town, in which he gave judgment for the plaintiff (now respondent) for £20 and costs for wrongful dismissal as floor manager at the Skating Rink.

The appeal was dismissed with costs.

The Acting Chief Justice said that it was fortunate there was a letter upon which the Court could come to a decision on the facts, in

the face of the conflicting evidence in this case. The letter engaged the plaintiff for a month at £3 a week, and afterwards this agreement was extended in writing, at the same salary, to the "end of the season." The plaintiff was dismissed at a week's notice. Had he served until the end of the season he would have been entitled to £45 for fifteen weeks' salary. The Magistrate had given judgment for £20, which seemed rather high; still this was in the Magistrate's discretion. The appeal would be dismissed with costs.

[Appellant's Attorney, D. Tennant, jun.; Respondents' Attorney, J. Ayliff.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

LUCKE V. GRAY. { 1896. Sept. 3rd.

This was an action to recover £31 0s. 4d., balance of account between the parties.

Mr. Graham for plaintiff, defendant in person.

The plaintiff's declaration set forth:

1. The plaintiff is Edward Bernhard Lucke, an architect, residing at Green Point, in the Cape Division; the defendant is Brenton Gray Gray, residing at Observatory-road, also in the said division.

2. In or about the month of December, 1894, and thereafter from time to time during the years 1895 and 1896, at the special instance and request of the defendant, the plaintiff undertook to perform certain work, labour, and services as an architect, in and about the preparation of plans, specifications, bills of quantities and special supervision for the erection of a certain building. The plaintiff performed certain services in connection with an arbitration between the said defendant and one Rowe, and in the raising of a loan for the defendant at his special instance and request.

3. The plaintiff has duly performed the said work and labour, and rendered the said services; and has rendered a due account thereof to the defendant, whereby the defendant became indebted to the plaintiff in the sum of £85 7s. 6d. sterling, whereof the defendant has paid the sum of £54 7s. 2d., leaving a balance in favour of the plaintiff of £31 0s. 4d., which the defendant wrongfully and unlawfully refuses, though requested, to pay.

4. The plaintiff annexes hereto a copy of the said account wherein the said balance in favour of the plaintiff is shown, and the amounts of the said indebtedness of the defendant, which were agreed upon from time to time, more fully set out, which the plaintiff craves may be considered as inserted herein. Wherefore the plaintiff prays for judgment for the sum of £85 7s. 6d. less the sum of £54 7s 2d., being a balance of £31 0s. 4d. with interest *a tempore moræ*, alternative relief, and costs of suit.

The defendant's plea was:

1. The plaintiff is Edward Bernhard Lucke, but he is not an architect; the defendant is not Brenton Gray Gray, but Brenton Gerrish Gray, and resides in the Wynberg, not in the Cape Division.

2. The defendant did, at the time specified, agree with the plaintiff to undertake certain work in connection with a certain building but he did not ask the plaintiff to prepare plans or specifications nor for special supervision; the plans and specifications were already prepared by Messrs. G. R. and H. R. Rowe, and plaintiff asked defendant to pay Messrs. Rowe for said plans, promising to work on them with slight alterations. He (plaintiff) subsequently prepared fresh plans without defendant's knowledge, and on these plans the building was worked. Plaintiff has never seen any bills of quantities. The defendant did ask plaintiff to arrange a dispute between himself and Messrs. Rowe, but defendant declines to pay plaintiff for such services, as whereas he was instructed and promised to act on his (defendant's) part, he accepted a commission from Messrs. Rowe for said services, which act defendant considers a fraud on the part of plaintiff.

3. The plaintiff did not complete the work to be performed, and was for the last two months able to give scarcely any supervision owing to his being fully engaged with work elsewhere. The plaintiff is only entitled to £50 provided the work was properly executed, his agreement with defendant being 5 per cent., on the cost of the building. The plaintiff is not entitled to even his 5 per cent. having during the months of February and March been repeatedly drunk and quite incapable of superintending the builders' work, whereby mistakes have been made and additional expense incurred for alterations.

4. The defendant annexes hereto a copy of his contra-account amounting to £55 10s.

which he claims may be inserted herein, and prays for judgment for this amount, and that he may be relieved of the costs of this suit.

The replication admitted that defendant's name is Brenton Gerrish Gray, otherwise the replication was general. The counter-claim was denied.

On these pleadings issue was joined.

Edward Bernhard Lucke, the plaintiff, said he was an architect practising in Cape Town, and had been in business seven years. In December, 1894, he received a letter from the defendant asking witness to call upon him. In consequence, witness called, and defendant said an action was pending against him by Rowe, a builder, at Observatory-road. Defendant asked witness if he saw any chance of settling this action. Rowe's claim was about £500. Witness went to see Rowe and discussed the claim with him, and eventually awarded Rowe about £200. Defendant asked him to arbitrate in the matter. Witness examined all the work that had been done, and valued it. Witness saw Rowe's plans. Defendant was unable to continue the work, and Rowe sent in his claim. Witness afterwards saw defendant, who asked him what his charges were. Witness said his charge was £5 5s., and then defendant asked witness as to arrangements for carrying on the building. Defendant wished witness to start to build a house of a cheaper nature at once. At that time witness had received nothing from Rowe, who afterwards paid him £5 5s. This was a voluntary payment, and did not affect witness's claim against the defendant. The arbitration entailed a great deal of work. Defendant asked witness to prepare plans for a house to cost about £1,100. Under Rowe's plans the house would have cost £1,600. He only used the two front walls according to Rowe's plans. Witness then prepared plans, and with a few minor alterations defendant was satisfied, and the plans were sent in to the Mowbray Municipality. The building was afterwards erected according to the plans of witness. Defendant was to pay £15 15s. for plans and specifications and 5 per cent. for special supervision; 7½ per cent. was the usual charge, 2½ per cent. being paid by the builder for quantities Defendant was his own builder. Witness was never incompetent through drink.

Cross-examined by defendant: Witness made no efforts at first to raise a loan, because witness had not the usual cover of one-third. Defendant asked him to try to effect a settlement with Rowe. Witness was not aware that the reason why Rowe was not able to bring an action in the Supreme Court was because a certain document was missing. He believed he had received a letter from Messrs Van Zyl & Buissinné asking him for a document—a copy of an agreement between defendant and Rowe. The document was not then in the possession of witness, who found it afterwards when the house was finished. Witness might have it still or it might be destroyed. Perhaps witness did tear this document up in defendant's place. Witness believed he got the document from Rowe with the plans and specifications. Witness did not think he had charged the mason Fortuin (a Malay) anything for supervision.

Re-examined: The plans were submitted to defendant, who had never objected to them in any shape or form.

This closed the case for the plaintiff.

For the defence,

Brenton Garrish Gray, the defendant, said in 1894 he purchased a piece of ground at Observatory with the intention of putting up a shop. Messrs. Rowe, since bankrupt, prepared plans and expected to be able to raise a loan, but were unable to do so. Negotiations took place between plaintiff and Messrs. Rowe, and to the best of witness's belief plaintiff tried to raise the loan for them. Messrs. Rowe were to bring an action against plaintiff for £500, but plaintiff told defendant they could not do so because of a certain document which plaintiff said he had had in his possession. Defendant held the possession of this document as a threat over defendant. Plaintiff asked defendant whether he would like the case with Rowe compromised, and afterwards went down to Messrs. Rowe promising to act on defendant's behalf. Plaintiff came back, and said Messrs. Rowe would take £148 to compromise the case. Plaintiff offered Messrs. Rowe through plaintiff £120, which Messrs. Rowe accepted. Defendant gave plaintiff a cheque for £120, and Messrs. Rowe signed the receipt produced. Plaintiff said he would leave his charge to defendant. Plaintiff said he would try and alter the plans so as to put up a cheaper building. Afterwards plaintiff prepared fresh plans, admitting that he had made use of Rowe's plans. Plaintiff obtained from Messrs. Hazell and Steer a commission on a certain loan made to defendant, though he did not introduce plaintiff to them. The mason Fortuin could not speak English, and prices were interpreted by plaintiff. Defendant sent plaintiff money to Johannesburg to bring him back. Plaintiff sent an account which witness refused to pay, on the ground that plaintiff had received about £50 or £60 in commission from various people.

Cross-examined: The house was first to cost about £1,500, but witness could not get a loan,

so the work was stopped. Rowe afterwards sent witness an account amounting to over £500. He could have got the money by cabling to England. Plaintiff stole the document off Mr. Rowe's table, and tried to induce defendant to employ him. He knew this, because plaintiff could not have got the document in any other way. Plaintiff for two or three months took his meals at witness's house.

James Phillips, carpenter, said plaintiff was away from the building fourteen days. There were several defects in the building. There were half-inch cracks all over the stoep.

Alice Gray, wife of defendant, said she was present when plaintiff offered to do "everything" for 5 per cent.

Cross-examined: This was before the building was begun.

Henry Rowe, builder, said he introduced plaintiff to defendant. He could not say what plaintiff's profession was. Witness took plaintiff to be acting for defendant as to the compromise. Plaintiff said nothing as to remuneration. Witness gave plaintiff £5 5s. for his trouble in getting the case settled.

By the Court: The usual charge for preparing plans was 2½ per cent., superintending by arrangement. A fair charge in the present case for supervision would be 5 per cent., and for preparing plans and specifications 2½ per cent. The builders generally paid 2½ per cent. for quantities.

Mr. Graham having spoken on behalf of plaintiff, and defendant for himself,

A verdict was given for the plaintiff for £23 2s. 10d. with costs.

The Acting Chief Justice said that in this case the first of the five items of which the plaintiff's account consisted was one of £5 5s. for arbitration in the dispute between defendant and Messrs. Rowe. From Mr. Rowe's evidence, the compromise made by plaintiff was most satisfactory to the defendant. Until the evidence of Mr. Rowe was heard, the Court was in doubt as to whether it was right for the plaintiff to charge double fees, but Mr. Rowe said that his firm paid the plaintiff voluntarily £5 5s. in consideration of his trouble. The plaintiff had not forfeited his right to the £5 5s. claimed from defendant, and under the circumstances the amount would be awarded to plaintiff. The second item, £15 15s., for plans, depended on the 5 per cent. commission on the £1,131 10s., stated cost of the building. Here there was a conflict of evidence. Defendant deposed and his wife corroborated him that the 5 per cent. was to cover everything. Mr. Rowe's evidence again helped the Court, as Mr. Rowe said that 5 per cent for plans and supervision, and 2½ per cent. for quantities, was the usua charge. No doubt Mr. Rowe's plans had helped the plaintiff, and looking at the fact that the £15 15s. was less than the usual 2½ per cent., this item should be awarded; to include also the item for copies of plans, which the plaintiff must have known would be required. As to the item of £5 5s. for attempting to raise a loan, no doubt the plaintiff did work in this respect, but work of this kind must be effectual to be paid for; this item would therefore not be allowed. Moreover, plaintiff got a commission from Messrs. Hazell & Steer in this respect. The fifth item, £56 10s., depended on the amount expended on the building, and it was most unfortunate that the defendant had lost his book, the book which stated the cost of the building. In one of his letters however, defendant admitted that the building cost £1,060. The item of £56 10s. would also be allowed. This altogether would make £77 10s., of which £54 7s. 2d. was admitted to have been paid, leaving £23 2s. 10d., for which judgment must be given for the plaintiff. As to the claim in reconvention, defendant was in an awkward position, in that he was his own builder and did the work himself, so that the claim for faulty work could not be allowed. As to the £13 10s. claimed by the defendant for board, what took place, according to the evidence, was that plaintiff was invited to lunch one day by the defendant, and thereafter he invited himself, and an account could not be made up in this way. The defendant had altogether failed in his claim in reconvention, and there would be a judgment for the plaintiff for £23 2s. 10d., and costs.

[Plaintiff's Attorneys, Messrs. Fairbridge Arderne & Lawton; Defendant in person.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

VAN NIEKERK V. HUGO'S TRUSTEE. } 1896. Sept. 8th.

This was a motion for an order to compel the trustee to accept a proof of debt in a certain estate of £50 instead of £32, to which the trustee had reduced it.

Mr. Graham appeared for the applicant.

Mr. McLachlan appeared for the respondent.

In the original action the trustee was brought into court on a notice of motion to show cause why his plan of distribution should not be amended and the applicant awarded the full amount of his proof. The case had been postponed for the matter to be taken before the Resident Magistrate for settlement of the question of set-off, but nothing had been done.

After argument,

The Acting Chief Justice said the *original applicant in this matter was the creditor, who had filed a proof of debt against the estate to the amount of £50. The trustee, instead of awarding a dividend on the amount of the proof, reduced the claim to £32, setting off an amount for work and labour alleged to have been done by the insolvent. The value of this work and labour was disputed, and the Court decided that the dispute could not be settled on affidavits. The matter was postponed for the dispute to be settled in an action which the creditor proposed to bring in the Court of the Resident Magistrate of Richmond. No proceedings whatever had been taken, and the matter stands exactly where it did when it first came before the Court. The trustee is bound by a proof of debt until he can show good and sufficient reasons for its reduction. It has already been decided that the affidavits filed do not satisfactorily establish the set-off claimed. Under the circumstances we can only order the trustee to amend the account by awarding to the applicant a dividend on the amount proved by him. This will not prevent the trustee from suing the creditor for any amount for work and labour done. The trustee has acted perfectly *bona fide* in the case, and the costs will come out of the estate.

[Applicant's Attorney, S. J. Mostert; Respondent's Attorney, H. P. du Preez].

In re W. J. VAN WYK'S ESTATE.

Mr. Shell, on behalf of the trustee in the insolvent estate of Wil'em Jacobus van Wyk, applied for an order empowering the Resident Magistrate of Calvinia to examine certain five witnesses.

Order granted.

CLARK V. CAPE TOWN TOWN COUNCIL. { 1896. Sept. 8th.

Mun.cipality—Cape Town Council—Casual vacancy—Election of Councillors—Notice—Ratepayer *Locus standi.*

The Town Clerk, Cape Town, gave notice on the 18th Aug. that on the 14th Sept. an election of Councillors to fill six vacancies would be held; nominations to be sent in by Aug. 31.

On Aug. 29 a casual vacancy occurred by resignation of a Councillor.

No steps were taken to call for nominations for the extra vacancy; but on the 1st Sept. (the day after nominations had closed) a notice was issued by the Town Clerk that nine nominations had been sent in and that seven Councillors would have to be elected at the elections on the 14th Sept., thus giving the first official notice of the seventh vacancy.

The Court *granted an interdict to forbid the election of more than six members, owing to the insufficiency of notice in regard to nominations to fill the seventh vacancy.*

This was an application on motion calling on the Town Council of Cape Town to show cause why it should not be restrained from proceeding with the election of more than six Councillors at the election of Town Councillors for the city of Cape Town fixed for Monday the 14th September, 1896.

Mr. Innes, Q.C. (with him Mr. McLachlan), appeared for the applicant.

Mr. Searle, Q.C., for the defendant Council.

The affidavit of John Henry Clark, the applicant, was as follows:

1. That he is a merchant carrying on business in Cape Town and duly qualified to vote at the ensuing annual election of Councillors for the city of Cape Town.

[2—5. Quote the provisions of sections 24, 26, 28 and 30 of the Cape Town Municipal Act, 1898.]

6. That on the 18th day of August last an advertisement bearing the signature of the Town Clerk appeared in the "Cape Argus" giving notice that an election of SIX Councillors for the city of Cape Town would be held on the 14th September following, and that requisition papers nominating candidates must be transmitted to him on or before the 31st day of August.

7. That the deponent is informed and verily believes that at a meeting of the Town Council held on the 27th day of August last it was proposed by the Mayor (Mr. James William Attwell) and resolved by the meeting that leave of absence should be granted to Mr. John Garlick, who was at the time supposed to be a duly qualified Councillor.

8. That on the following day it was unofficially announced in the "Cape Times" or

* See (6 Shell, 124), for the report of the preceding application.

other newspaper that Mr. Garlick had resigned his office of Councillor, but no official notice has yet been given of a day for nominating a candidate to fill the vacancy caused by such resignation.

9. That on the 31st day of August, in response to the advertisement referred to in the petition, nine candidates were duly nominated for election.

10. That on the 1st instant a notice appeared in the "Cape Argus" giving the names of candidates and intimating that there were seven vacancies to be filled up, viz.: Six vacancies occasioned by lapse of time, and one vacancy by the resignation of Mr. John Garlick, whose time of office would have expired in 1897.

11. That on the morning of Friday last, the 4th instant, the deponent and certain other ratepayers waited upon the Mayor, Mr. James William Attwell, as representing the Town Council, and pointed out to him that in their opinion the proposed election of seven Councillors at the ensuing election was illegal, and requested that the provision of the Municipal Act regulating elections should first be complied with, but the deponent is informed that the election is to be proceeded with on the 14th instant.

12. That the deponent is aggrieved at the proposal to elect seven Councillors instead of six at the ensuing election, and respectfully submits that the same is contrary to law and not in accordance with the provisions of the said Act.

Mr. Innes: The matter is one regarding the construction and meaning of sections in Act 26 of 1893. Nine nominations were sent in for six vacancies. There were no nominations for the seventh vacancy. In fact the vacancy was announced the day after the nominations. Section 21 says that three weeks' notice must be given, and describes the procedure. On the 18th August, notice in the paper was given. On the 31st August, nomination were given in. On the 1st September, the Town Clerk notifies for the first time that there are *seven* vacancies. Mr. Garlick's vacancy is entirely different to the others. Which of the persons elected is to fill Garlick's place? His vacancy is only for about a year. The others are posts for three years.

Mr. Searle: What prejudice can or does applicant allege he suffers? The grievance is a sentimental one. Section 25 provides that where a casual vacancy is filled up at the same time as an annual—the Councillor elected with the lowest votes takes the shortest term of office. There is no special form of nomination for casual vacancies. Section 28 provides for notice to be given of an election. The Town Clerk stated how many vacancies, but he need not have done so. Also see section 11; what provision is there for holding a special election? When the casual vacancy occurs within three months before election, the clerk has only to give notice of the number of vacancies (to be filled) *after* the nomination day; so long as there are twenty-one days' notice of the election the number of vacancies need not be known before the nominations. As to the *locus standi* of applicant, see *Pearce* v. *Claremont Municipality*, decided in July last. The Court will not interfere to set aside a slight irregularity if no substantial prejudice is shown to the applicant *Devenish and Botha* v. *Jackson* (7 J., 311).

The Acting Chief Justice said: The Cape Town Municipal Act, No. 26 of 1893, requires that when and as often as any casual vacancy shall occur in the Council the Councillor to be elected to fill such vacancy shall be elected in the manner provided for the election of Councillors at the annual election. The procedure is that the Town Clerk not less than twenty-one days prior to the election shall publish a notice specifying the day for the nominations to be handed in; and in not less than ten or more than fourteen days from this publication the candidates for the vacancies shall be nominated. After the nominations are sent in the Town Clerk is required to give notice if more candidates are nominated than there are places to be filled, and, if an election is necessary, state the day of the election, which must be not less than six days or more than twenty-one days from that time. There is a provision in the Act that if a casual vacancy occurs within three months of the annual election the time for filling up the vacancy may be postponed to the day on which the annual election is to take place. In this case on August 18 the Town Clerk issued a notice calling upon persons to nominate candidates for the six vacancies which happen annually. These nominations were to be sent in on August 31. At a meeting of the Council held on August 27 leave of absence was granted to Mr. John Garlick. Two days afterwards — on August 29 — as Mr. Byworth the Town Clerk says, he was notified by the Mayor that Mr. Garlick had resigned his office. Hence a casual vacancy occurred. It was certainly within three months of the annual election, but too late to allow the twenty-one days' notice to be given which the law required. The Town Clerk did not, as required by law, take any steps to call for nominations for candidates to fill the vacancy caused by Mr.

Garlick's resignation; but on September 1 he issued a notice stating that whereas six vacancies were to be filled on September 14, and whereas nine candidates were nominated, therefore out of the nine candidates (nominated for the six vacancies) seven would be elected, one of whom would take the place of Mr. Garlick, who had resigned. This is such an irregular course of procedure that it cannot be supported. No nominations whatever had been asked for to fill the vacancy consequent on Mr. Garlick's resignation. The only point now to consider is the argument that the petitioner suffers no more than a sentimental prejudice. Certainly no pecuniary prejudice is suffered, but it has been repeatedly laid down especially in one case with reference to a Divisional Council, that every person has a right to be properly represented in the public body which rules over him. In this case not only the applicant but also the whole electorate has been prevented from nominating anyone to fill the vacancy. It is not sufficient answer to say that the applicant must state that he would be a candidate or that he had a candidate to propose for the vacancy. The petitioner is entitled to nominate a candidate for the vacancy, which he has not been allowed to do. Nominations for six vacancies only were called for, and the nominations were sent in on the basis of six vacancies. Until the necessary steps are taken no attempt can be made to fill the casual vacancy. It is irregular to say that out of the nominations called for to fill six vacancies one extra shall be elected to fill the casual vacancy. The Town Council must be interdicted from the election of any more than six candidates at the election on September 14.

The application will be granted, with costs.

[Applicant's Attorneys, Messrs. Reid & Nephew; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

TRILL V. VAN RYN. } 1896. Sept. 12th.

Mr. Buchanan applied for provisional sentence on a mortgage bond of £555, together with interest at the rate of 6 per cent. from June 30 1895.

Application granted.

CURLEWIS V. DE BEER.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £50, together with interest at the rate of 10 per cent. per annum from May 7, 1895.

Application granted.

FAIRBRIDGE V. DE VILLIERS.

Mr. Buchanan applied for provisional sentence on a promissory note, dated April 7, 1895, for £288 11s. 11d., together with interest from July 27, 1895, less £5 paid on account.

Application granted.

MADDEN V. DE LACEY.

Mr. Close applied that the provisional order of sequestration granted on September 5 by Mr. Justice Buchanan be made final.

Application granted.

ADMISSIONS.

On the application of Mr. Close, Mr. Sydney Samuel Jacobson was admitted an attorney and notary of the Supreme Court.

On the application of Mr. Close, Mr. James Robert Townsend was admitted as attorney, notary, and conveyancer of the Supreme Court.

GENERAL MOTIONS.

THE PETITION OF PAULINE B. BURDACK.

Mr. Jones applied on behalf of the petitioner for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, and for an order giving her the custody of the minor children of the marriage and declaring him to have forfeited his share of the community.

In the year 1888 they induced me to amalgamate my business with theirs, and I thereupon manufactured cigars on their behalf on their premises. Previous to this, they had no knowledge of manufacturing cigars and the only knowledge they possess at present has been acquired from me.

On entering their service I requested a written agreement, but Mr. Carl Becker assured me that such a course was not necessary, so I had to be satisfied with a verbal contract, which *inter alia* provided that when the profits from the cigar factory reached £2,000 per annum, I should receive £500 per annum, but respondents failed to keep an account of the factory's earnings. I am satisfied that this, the largest part of their business, yielded an annual profit of £2,000 for years past, but I have not been paid accordingly. I, on more than one occasion, requested the respondents to keep a proper account in connection with the factory; but in vain, consequently I became dissatisfied, as I was not willing to work for a mere wage with my knowledge and skill in the trade.

5. I have on many occasions during the last few years informed Mr. Becker that I would leave the firm, and in December last year I gave the firm formal notice of my intention to leave and to start business on my own account, but Carl Becker induced me to remain a little while longer with his firm, but as my plant and material were already ordered, I only remained till my arrangements were completed and gave final notice at the end of June last of my intention to leave the firm to start business on my own account, and of course mentioned the matter to the factory hands, many of whom were in my employ before I joined the respondents' firm, in fact I have trained them from their youth and taught them all they know. I did not induce these employés to leave respondents' firm; they exercised their own choice in the matter.

6. I deny the allegations contained in paragraph 8 of respondents' affidavit and say that it was greatly through my personal influence and recommendations that these cigars became popular. I never used any of respondents' labels as stated by Carl Becker; the labels which I am using were ordered by Messrs. Ernst Ebert & Co., who received them here in January last.

7. I say that Carl Becker is well aware of the fact that small manufacturers in Cape Town have frequently used the El Andaluz brand. I have personally brought the fact to his notice.

8. It is quite true that I did on several occasions suggest to respondents the advisability, with the permission of the exporters of the labels in question, of having them registered, but they declined to do so.

9. In reply to paragraph 11 of respondents' affidavit I say that they are well aware that my cigars bearing the Duke of York and El Andaluz brands are far superior to those produced by them, and their attempted registration of these labels is for the sole purpose of damaging me in my business.

10. I say that the allegations in paragraph 12 of respondents' affidavit are incorrect, and in proof thereof I annex hereto a translation of a letter received from Klingenberg Brothers, and I say further these labels can be procured from England, France, and America without going to Germany.

There was also certain correspondence between Messrs. Klingenberg and the applicant, among other letters being one as follows to applicant:

"As far as the brand Duke of York is concerned, we have indeed disposed of the monopoly of it for South Africa to a German exporting firm, which firm might have handed over the monopoly to Messrs. J. H. Sturk & Co. The Andaluz brand, however, we have not sold the monopoly of. If consequently you can not deal in the Duke of York brand, you will undoubtedly find a substitute in our very comprehensive collection."

"We are sending you along samples of our brand Princess Teck which you are likely to find a very good substitute for the Duke of York. We will in future regularly send you anything new in our line, that so you may be inclined to favour us often with your orders."

Mr. Innes, Q.C., for the applicant. The applicant objects to the registration on the ground that he is as much entitled to use the mark as respondent. Under Rule 13 of Deeds Office Regulations (under Act 22 of 1877 section 7) the Registrar of Deeds has referred the matter to this Court. The facts are somewhat unusual. It is common cause that neither respondents nor applicants designed the trade marks—they are designed in Germany for purchase elsewhere. The applicant and respondent have both been using them for a long time. The applicant got his labels in January but used them in June. The Duke of York label belongs to Klingenberg who clearly has not ceded to Sturk. Sturk alleges he is the cessionary of the Andaluz brand. The object of registering a trade mark is to make a man's goods known by a distinctive device. It is not distinctive if the mark is in use commonly and no right

is acquired if it simply is registered by one user by stealing a march on the others. The definition of trade mark as in the Act of 1877 (No. 22) has been amended by the Act of 1891 and that of 1895. The device sought to be registered is not distinctive. There is no decided case in point in the colony, and our Act is meagre compared with the English. As to marks in common use *before* 1875 (the date of the first Trademark's Act) the English Act allows registration by only three users. (*Sebastian* on *Trade Marks*, p. 53, 3rd edition.) This referred to *old* marks in common use *bona fide* before the Act and before any controversy arose. If only three persons or less claim registration those three can have it. The utmost our Court would do is to extend the provision of the English law to meet this case. The designs can be bought all over the world. The respondents make no case that they are the cessionaries except as to the El Andaluz design, though the original owner of the mark (Klingenberg) denies he has sold to Sturk. All we want is to prevent the present application to register—the Court could then order pleadings to be filed and a declaration of rights obtained. In England if after even five years' registration it is discovered that the mark was in common use it is struck off. *Lloyd* v. *Bottomly* (27 Ch. Div., 246); *In re Hyde & Co.* (L.R. 7, Ch. Div., 724). Sturk & Co. have no exclusive right—the designs can be bought and used freely. They admit the designs are made in England and Germany. We and respondents have each bought them from the manufacturers.

Mr. Searle, Q.C, for the respondents: The only ground applicant can go on is that the label is in common use. For any person can register a mark, provided it is not registered in England with Colonial rights—or is not in common use. The Merchandise Marks Act has nothing to do with this case. Sturk denies that the mark is in common use, and the facts on the affidavit are not corroborative of their being in common use. As to common use, see *Sebastian on Trade Marks* (p. 47). Dieterle introduced them for Sturk.

Mr. Justice Maasdorp said: In this case application was made to the Registrar of Deeds by the respondents for the registration as their trade marks of certain two labels called the Duke of York and Andaluz labels, which are used by them, in their business as cigar manufacturers, on their cigar boxes. The applicant objected to the registration on the ground that labels identical in design and with the same device have been used by him in the business, and have for a considerable time been in common use in the trade, both in this country and elsewhere. Under a rule of the Office of the Registrar of Deeds, the parties were referred to this Court for the determination of their rights. The information placed before the Court is certainly of a very meagre description, and any order now made must be such as not to debar either party from proceeding by way of action to have their rights finally determined. There is upon the affidavits a direct conflict of evidence, and if the allegations made by the applicant are true, the only conclusion would be that the respondents are not entitled to be registered as the proprietors of the trade marks claimed by them. On the other hand, if the statements of respondents are correct they may substantiate their title. The main ground of objection relied on by the applicant is that the labels in question are not such distinctive marks and devices as are contemplated in section 2 of Act 12 of 1895, by reason of the fact that they have been in common use in the trade. Now having regard merely to the appearance and design of the labels, it must be said that they are in that respect distinctive, and would form excellent distinguishing marks for any goods to which they may be attached. But something more than that is required to constitute a distinctive mark within the meaning of the Act. It is essential that such mark should not have been in common use in the trade in respect of which its exclusive use is claimed. Common use would deprive it of its distinctive quality so far as any particular individual is concerned, and would destroy exclusive right to its use. The applicant says both these labels have been in common use not only in this country, but in other countries, and they are used by certain small cigar manufacturers in this town. This is an affirmative statement as to a matter of fact of which he must be supposed to have positive knowledge. On the other hand, the respondents say that this is not the case to their knowledge. It is quite possible that the respondents may not be aware of the fact, but it may nevertheless be true. It appears from a letter received by the applicant from Klingenberg, who is one of the manufacturers of these labels, that he has sold the exclusive right to the use of one of these labels to some firm in South Africa other than the respondents, and that the firm of Klingenberg, through whom the respondents claim their rights, manufacture similar labels and are prepared to sell them to any one desirous of purchasing them. Applicant has in fact bought a large stock of them, and has labelled a large number of cigar boxes with them. If the labels are proved to be in common use, respondents will not be entitled to have

them registered as their trade mark. On the other hand, respondents may be able to prove that they alone obtained these designs from Klingenberg, that they have ever since had the sole and exclusive use of them, and are consequently entitled to their registration. The Court will now grant an order restraining the Registrar of Deeds from registering these labels as the trade marks of the respondents, until such time as the respondents may by action establish their right to have them so registered. If such action is not brought to trial by the end of next term, costs of this motion to be paid by the respondents.

[Applicant's Attorney, Gus. Trollip; Respondents' Attorney, W. E. Moore.]

TABLE BAY HARBOUR BOARD v. METROPOLITAN AND SUBURBAN RAILWAY. | 1896. Sept. 12th.

Interdict — Expropriation — Land—Railway Company—Harbour Board—Act 23 of 1889—Act 36 of 1896—Private Railway Act—Description of land—Diagrams—Discrepancy.

The Metropolitan Railway Co. held certain land on lease from the Government subject to termination at three months' notice.

On the promulgation of Act 36 of 1896 the company notified the Board (in whom the land became vested in terms of the Act) of their intention to expropriate under the powers alleged to be vested in them by Act 23 of 1889.

The Board thereon gave notice to terminate the lease, and applied for an interdict to prevent the company proceeding with the expropriation.

The Court held that *the company had not the powers of expropriation claimed, as the land required did not fall within the local limits of deviation defined by the Act.*

This was an application for an interdict restraining the respondents from taking any further steps in connection with their claim to expropriate a piece of land belonging to applicants and situated at the foot of Adderley-street, until their right to expropriate the same shall have been settled by a competent court of law.

Mr. Innes, Q.C., for the applicants.

Mr. Searle, Q.C., appeared for the respondent company.

Mr. Sheil (with him Mr. Bisset) appeared to watch the case on behalf of the Government.

The following was the affidavit of Mr. Frank Robb, secretary to the Table Bay Harbour Board:

1. That by Act No 23 of 1889, the Metropolitan and Suburban Railway Company (Limited), was authorised, and empowered to construct a railway from a junction with the Government Western Railway System at or near the Cape Town Goods-station and thence *viâ* the Dock-road to Sea Point within the limits of deviation shown in the plans duly lodged with the Clerk of the House of Assembly.

2. An extract from the plan is hereunto annexed marked A. From this plan it will be seen that the starting point is in the Government Goods-yard, and that the land between Zero and Adderley-street is marked with the figure 1. A reference book was lodged with the plans and in this book No. 1 is described as being Goods-station Yard and lines the property of the Colonial Government, and occupied by the Railway Department. A copy of the reference book is hereunto annexed, and marked B.

3. The railway was constructed to Sea Point in due course, but owing to the refusal of the Colonial Government to allow the railway to enter the Goods-yard, no junction with the Western Railway System has been effected, and in order to accommodate the company the Harbour Board on the 11th August, 1892, agreed to give the company a lease of a piece of land between the Goods-yard and the sea, for the purpose of erecting a terminal station thereon, the lease to be for a period of twelve months and thereafter to be terminable at three months' notice.

4. On the 20th June last the secretary of the company wrote to the Harbour Board asking for permission to lengthen the dead end at the terminus. Some correspondence ensued and eventually the Harbour Board declined to accede to the company's request.

5. On the 7th August last the company gave notice that they intended under section 6 of Act No 23 of 1889 to acquire a piece of land to the southward of the land leased to them, as will more fully appear from the copy letter hereunto annexed, marked C, to which the reply marked D, dated 12th August, was sent, and on the 14th August, the company offered the sum of £1,000 as compensation for the land now occupied by them in addition to the portion of which they had given previous notice to expropriate, at the same time intimating that it was intended to expropriate both pieces, as per letter hereunto annexed marked E. To this the reply copy of which is hereunto annexed marked F was sent. On the 2nd

instant the letter copy of which is hereunto annexed marked G was received, calling upon the Harbour Board to refer the matter to arbitration.

6. The land which the company is now claiming the right to expropriate is beyond the limits of deviation shown on the plan filed with the Clerk of the House of Assembly as aforesaid.

The following is the letter to the Board (marked C) referred to in the above affidavit:

"I am instructed by my directors to intimate to you that it is their intention under section 6 of Act 23 of 1889 to acquire the land shown on the accompanying plan at the Cape Town terminus of the Metropolitan and Suburban Railway Company (Limited). Will you please fix the purchase price thereof so that arbitration may be resorted to unless an agreement be come to with regard to the purchase price."

To which the reply (marked D) was as follows:

"In reply to your letter of the 7th instant intimating the intention of your directors to acquire, under section 6 of Act 23 of 1889, certain land at Cape Town shown on the tracing accompanying your letter, I am directed by the Board to state that they are advised that the company has no power under Act 23 of 1889 to expropriate the land in question."

The company sent a further letter to the Board (marked E) as follows:

"On behalf of the Metropolitan and Suburban Railway Company (Limited), we are instructed to offer you the sum of one thousand pounds sterling as compensation for the land at the Cape Town terminus of that company's line being that now occupied in addition to portion coloured "blue" as indicated on the plan already sent to you by the company's secretary the whole of which land it is now intended to expropriate.

"Kindly intimate to us on or before the 22nd inst., whether you will accept the above sum or not.

"This notice is in terms of section 12 of Act 9 of 1858, to which we draw your attention."

These terms the Board refused, and the company demanded that steps be taken for arbitration.

The following was the replying affidavit of Mr. Gus Trollip:

1. I am Chairman of the Board of Directors of the respondent company.

2. I have perused the affidavit sworn to by Frank Robb on the 8th day of September instant.

3. I say that the greater portion of the land belonging to the applicants which the respondents have given notice of expropriation, has since the opening of the line for traffic been occupied under lease from the applicants with the knowledge and sanction of the Colonial Government, as a terminal station and shunting site.

4. That the said company requires the land referred to in annexure "E" of the said Frank Robb's affidavit for the purposes of a terminal station, and other works which are absolutely requisite and necessary for the efficient construction, maintenance and working of the said railway, and that section 6 of Act 23 of 1889 empowers the company to expropriate the land in question.

5. That the Railway Department has refused to allow the respondent company to have its terminus within the Goods-yard, as shown on the copy plan annexed to the applicant's affidavit in this matter, and moreover the Commissioner of Railways has failed to come to an agreement with the directors of the said company as provided in section 2 of Act 23 of 1889, notwithstanding the fact that four years have elapsed since the railway was opened for traffic; on the contrary, the Colonial Government through the Railway Department apparently has no intention whatever of giving the said company facilities for a terminal station as contemplated by its Act of Incorporation, and the Railway Department is further attempting to inconvenience the said company by endeavouring to expropriate the land now under lease to the respondents and used as a station and shunting site.

6. That if the respondents be debarred from expropriating the land in question, the whole object of the Act 23 of 1889 will be frustrated.

7. In proof of the allegations contained in paragraph 5 hereof, I annex hereto a letter addressed to the secretary of the said company marked A, and written after the respondents had already given notice of expropriation to the applicants.

8. In reply to paragraph 6 of the said affidavit, I say that the land may or may not be beyond the limits of deviation shown on the said plan, but by section 12 of Act 9 of 1858 the respondents are empowered to expropriate the land in question under the circumstances if required for the purposes of Act 23 of 1889.

The annexure "A" was a letter in the following terms:

"I am directed by the Board to give you three months' notice from to-day to vacate the land at present occupied by the company's terminus at Cape Town in terms of the agreement contained in correspondence dated 1892. The Board are advised that the land is

required for purposes of the Government Railway Department who have given notice of expropriation."

Mr. Innes: The respondents proceeded under the Roads Act of 1858. If we appoint arbitrators we recognise their right to expropriate which we dispute. If we do not appoint they simply lodge money to our credit in the bank and proceed to take the land. We are obliged to come to Court for an interim order. We say the land to be expropriated is outside the diagram and the Act limits, and they have no right to take it. Section 1, Act 23 of 1889, gives a description of the railway. Section 2 gives description of the land and route and provides as to deviations. The notice under that section was given us but only in respect of other land, not of the bit now in question. The powers of expropriation can only be used for the railway as described in the Act. There is a difference between the power of Government and of a private company as to expropriation. The Government gets it by a public Bill, gives no notice and furnishes no plans; where necessary, they can extend a station without further powers. See *McDonald's case* (7 Juta, 250). As to private company's powers, see *Sedgwick* v. *Metropolitan and Suburban Railway Co.* (7 Juta, 328). The Railway Company has been before the Court several times for attempting to go outside the plan. *Town Council of Cape Town* v. *Metropolitan and Sea Point Railway Co.* (1 Sheil, 253) was an application to interdict this company alienating land outside the line of deviation marked on this plan. See also **Metropolitan and Sea Point Railway Co.* v. *Commissioner of Crown Lands* (2 Sheil, p. 8.)

Mr. Searle: If the Act allows them "such land as is required for the purposes of the railway"—if the Act and the plans filed in connection with it differ the Act overrides the plans, and the company can expropriate. This is an entirely new case by the Harbour Board. For in *Table Bay Harbour Board* v. *Metropolitan and Sea Point Railway Co.* (9 Juta, p. 437) the Board sued the company *re* land expropriated under Act 23 of 1889, and came into court, and sued to insist on the award being made on order of Court. Section 6 of the Act gives the widest powers to the company as to any land *upon the railway line*. This land is vested in the Harbour Board under Act 36 of 1896. Act 9 of 1858, sections 10 and 12, are in the widest terms and wide powers of expropriation are conferred on the company; provided the Court is satisfied they require land for proper working of the railway. There is no other land available. The principle of the Act would be frustrated if the land is not obtained.

Mr. Innes: The land was waste Crown land reclaimed from the sea and the company could not expropriate. The Act No. 36 of 1896 was promulgated on 1st August, vesting the land in the Board. On the 8th August, the company gave notice of expropriation. We then replied with notice of termination of lease.

Mr. Justice Maasdorp gave judgment. He said: The applicants in this case have applied to the Court for an interdict to restrain the respondent company from taking any further steps in connection with their claim and expropriating a piece of land belonging to the applicants. It appears that this application arose out of certain transactions that have been going on for some little while, and has reference to certain ground which is held by the respondents from the applicants under a lease subject to three months' notice. The respondents, being apprehensive that they might lose the property if held on such a precarious tenure, are under the impression that they can take advantage of the Act under which the company came into existence for the permanent expropriation of the land. They thereupon gave the applicants notice of their intention to proceed under what they considered to be their powers under the Act. Now it appears that in the first section of the Act a certain line is laid down upon a certain plan describing the properties belonging to different individuals along which the line of the company should pass from Cape Town to Sea Point. As far as the description there is concerned the powers of the company for the purpose of actually laying down the line would be limited to the limits of the properties so described. It is, however, contended by the respondents that, though there are limits given in the plan and description, yet if it is found on reference to other sections of the Act that the powers granted must be taken to extend beyond those boundaries, the descriptions in the plan shall not stand in the way of the exercise of such rights. In section 6 powers are given to the company which are similar to those bestowed upon the Commissioners of Roads by Act 9 of 1858, and it is contended that, as the powers given to the Commissioners of Roads were so large as to enable them to take land and material without reference to any local limits, that the same powers are conferred upon the company. But in my opinion the powers claimed by the company under section 6 must be restricted and confined to the local limits described in the Act. Upon

* 9 Juta, 61.

reference to section 2 it will be seen that a deviation may be made in the line of railway with the consent of landowners through whose land the line may pass, and no right of expropriation against the will of landowners is granted for the purposes of deviation. In *Sedgwick's case* the Supreme Court held that whereas the Act gave the power of entering the vacant lands belonging to Sedgwick, the company could not go upon his enclosed lands. The limitations placed by the Act on the operations of the company clearly show that it was not intended to confer on them the wide powers of expropriation possessed by the Commissioner, of Roads under Act 9 of 1858. The land which the respondents now wish to expropriate lies beyond their limits of deviation, and without the consent of the owners they have no means of acquiring it. It certainly appears that the company is in a very awkward position. and much stress is laid on the circumstance that perhaps the object of the Act itself might be frustrated unless the rights which the company now claim are allowed. It does not seem to me that that has been very clearly established; but even if it is so it is merely a difficulty which the company has placed itself in. The construction I place upon the Act is that though there are some powers given to the company with reference to the expropriation of land and the taking of material, yet these powers are confined to the local limits described in the Act, and that no deviation could go beyond that. and that consequently the company should be interdicted from now proceeding further for the expropriation of this ground, which they hold under lease with some adjoining land. Leave is given to the company, however, to move the Court by an action to have this interdict set aside if they see fit. The interdict as claimed is granted with costs.

[Applicant's Attorneys, Messrs. Reid & Nephew; Respondents' Attorney, Gus Trollip; Attorneys for the Government, Messrs. Reid & Nephew.]

SUPREME COURT.

[Before Hon. Mr. Justice MAASDORP.]

REHABILITATIONS. { 1896, Sept. 15th.

Mr. Benjamin applied for the rehabilitation of the insolvent J. H. van der Westhuizen.

Mr. Justice Maasdorp said the insolvency took place fifteen years ago. before the Act of 1884, and rehabilitation must be applied for in terms of Act No. 15 of 1859.

Mr. Benjamin asked for the rehabilitation, subject to the formal requirements of the Act being observed.

Mr. Justice Maasdorp said the Court would have to take notice of the unfavourable report of the trustee. The application would be refused, but it might be renewed in three months.

Mr. McGregor applied for the rehabilitation of Samuel Lazarus, and said the application was refused six months ago, with leave to renew in six months. That time had now elapsed.

The application was granted.

GENERAL MOTIONS.

ESTATE OF GERT C. VAN ZYL. { 1896. Sept. 15th.

Mr. Benjamin applied for a further period of time extending to April 15 next within which to file his second account and plan of distribution in the said estate, the delay in liquidating the same being caused by the difficulty in disposing of the landed property belonging thereto.

The application was granted, with costs out of the estate.

FRY V. FRY.

Mr. Close applied for an order to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against the respondent, her husband, by reason of his alleged adultery.

The application was granted.

In re THE MINOR CAIRNCROSS.

Mr. Castens applied for authority to the Master of the Supreme Court to pay out and from the amount to the credit of the minor an annual allowance for two years, to enable him to complete his studies at the Victoria College, Stellenbosch.

The application was granted.

MALAN V. MALAN.

Mr. McGregor applied on behalf of the plaintiff for an order authorising the receiver appointed in the suit between the parties to realise the assets of the joint estate, or for such other order as the Court may consider meet; also that defendant be required to pay alimony in terms of the claim in plaintiff's declaration, together with the costs of the proceedings.

Leave was granted to the receiver to sell the land by public auction or private sale; the other portions of the application to stand over, as there might be no funds to dispose of.

THE PETITION OF VAN WYK'S EXECUTRIX

This was an application to make absolute the rule *nisi* for registration in petitioner's name of a third share of and in certain farm called Altona, situated in the district of Mount Currie, East Griqualand, purchased in 1876 from Plaatje van Wyk, whose whereabouts are unknown, but never transferred.

Mr. J. Rose Innes, Q.C., appeared for the applicant.

Mr. Close appeared on behalf of Mr. John Peter Wildridge to oppose.

By consent the case stood over until 12th October.

THE MINOR CHAS. P. TIRAN.

Mr. Tredgold applied for the appointment of some suitable person to represent the said minor in the execution of articles of clerkship with the attorney Christian M. Lind, and for authority to pay the costs of this application and of the articles out of the funds accruing to the minor from his parents' estate.

Mr. Justice Maasdorp said no order would be made for the present. The case had better stand over, the Master's report being unfavourable, and it not being clear that Mr. Lind would not consent to expunge the proposed clause in the articles intended to prevent applicant practising as an attorney at Oudtshoorn on becoming qualified.

ESTATE OF WILLEM J. SMIT.

Mr. Rose-Innes Q.C., applied for an order directing the Master of the Supreme Court to call a meeting of creditors of the said estate for the purpose of electing a new trustee in the place of William J. Smith, who is dead, to enable share in the farm Stofkraal, in the district of Fraserburg, to be transferred to the present owner thereof.

After argument, the application was deferred until the 12th October.

THE LATE LEONARDUS J. POPTA.

Mr. Tredgold applied for an order removing Edward A. Rudd from his office of executor testamentary of the said estate by reason of his conviction on a charge of fraudulent insolvency and his neglect of his trust, and directing the Master of the Supreme Court to take the necessary steps for the appointment of an executor dative.

The application was granted.

IN THE ESTATE OF THE LATE JOHANNES M. VAN DER WESTHUIZEN. { 1896. Sept. 15th.

Mr. Buchanan applied for authority to the executors testamentary of the said estate to mortgage the portions of the farms Doorn River and Paarde Poort, bequeathed to the children of Gert C. van der Westhuisen, for a sum sufficient to cover their share of the bond thereon, and of the debts of the estate, and costs to be incurred in transferring the bequeathed properties to the beneficiaries under the will.

The application was granted in terms of the Master's report.

THE PETITION OF CORNELIA M. GILDENHUYS.

Mr. Buchanan applied for authority to the Registrar of Deeds to accept as sufficient a power signed by petitioner for the transfer to the purchaser of certain shares of landed property in the district of Swellendam, bequeathed to the petitioner by her father, without the assistance of any representative of her husband, from whom she was separated, and who left no property, but died after she came into possession of the property in question.

No order was made.

SAREL PRETORIUS, JUN.

Mr. Buchanan applied for authority to the Registrar of Deeds to amend certain deed of transfer of the remaining extent of the farm Valschefontein, in the disritct of Colesberg, by describing petitioner by his correct name, and striking out the erroneous appellation of Charles Pretorius, jun.

The application was granted.

In re ELIZABETH C. J. M. LE ROUX.

Mr. Tredgold applied for the appointment of a *curator bonis* to take charge of and manage the property of the said Le Roux, with power to sell and transfer certain shares of landed property in the districts of Oudtshoorn and Willowmore if it should be found desirable to do so.

Pending further proceedings in lunacy Mr. G. C. le Roux was appointed temporary *curator bonis*; Mr. Buchanan to act as *curator ad litem*.

VILJOEN V. VILJOEN.

This was an application by the plaintiff for the removal of the suit instituted by him against the defendant, his wife (for restitution of conjugal rights, failing which for divorce), to the next Circuit Court to be held at Victoria West (where he resides), on the grounds of convenience and saving of expense.

Mr. Close appeared for the applicant.

The application was granted.

THE PAARL BANK.

Mr. Rose-Innes, Q. C., applied, on behalf of the liquidators, for an order in terms of the fourth and final report of the official liquidators, and for the sanction of certain compromises proposed to be effected with debtors.

The order was granted with the understanding that the books should be kept until the final order of dissolution had been granted by the Court. It was also ordered that the balance (about £1,300), after paying the final dividend, should be paid to the liquidators, and that the unclaimed dividends, amounting to £354, should be placed in the hands of the Master.

IN THE ESTATE OF THE LATE J. W. SMALBERGER.

Mr. Buchanan applied for authority to the Registrar of Deeds to cancel certain mortgage bonds passed to secure the fidei-commissary bequest in favour of the children of Johannes G. Uys, the said bonds being about to be paid off and the proceeds re-invested upon the consent of the executor dative of the Smalberger estate, and without that of the said children.

The Registrar was authorised to cancel the bonds on the production of the necessary documents.

THE PETITION OF LOUISA PIRIE.

Mr. Close applied for a *rule nisi* requiring petitioner's husband to show cause why she shall not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The application was granted, returnable on the 2nd of November next, personal service if possible, failing which one publication in the "Bulawayo Chronicle."

In re THE MINORS CLASSEN AND LANGE.

Mr. Rose-Innes, Q.C., applied for authority to the mother of the said minors and executrix of the estate of the late husband to transfer to the purchaser certain shares in the farms Stilfontein, Dreefontein, and Olievenfontein, in which the said minors are interested, sold by her for what she considers the full value.

Mr. Justice Maasdorp suggested that the application should stand over until the 12th October for the purpose of giving notice to all the interested parties.

Ex parte SCHREIBE.

Mr. Rose-Innes, Q.C., applied, on behalf of Wm. Schreibe, of Johannesburg, for an interdict against the Officer of Patents as to the transfer of the applicant's rights to two patented cigarette machines It appeared that the applicant and a partner, trading as Duke & Co., tobacco manufacturers, entered into an agreement with Frank James Luddington, now of London, for the purchase of two cigarette machines. The vendor undertook not to supply the same machines to any other firm in South Africa, and also gave Duke & Co. the right to take out a patent for the machine in South Africa. The petitioner afterwards handed his rights in the machine, together with other assets, over to the South African Tobacco Company in terms of certain agreements. These had not been kept, and the petitioner now asked that the Registrar of Patents should be interdicted from assigning the patent rights to the aforesaid company or any other person.

A rule *nisi* was granted, returnable on the last day of next term, to operate as an interim interdict, and to be served on the Registrar of Patents, South African Tobacco Company, and Mr. Luddington.

ESTATE OF JOHANNES MARAIS.

Mr. Benjamin applied for the appointment of a trustee in the insolvent estate of Johannes Marais. Two trustees had been nominated by

the creditors, one having the majority in number and the other in value, and as the differences between the two parties seemed irreconcilable they were compelled to come into court.

Mr. Justice Maasdorp ordered the case to stand over until the 12th of October for the purpose of giving notice to all entitled to receive it.

HAWORTH v. RESIDENT MAGISTRATE, KENHARDT. { 1876. Sept. 15th.

Appeal—Illegal impounding—Act 15 of 1892, section 72—Civil injury—Criminal proceedings—Resident Magistrate's sentence—Act 21 of 1876, section 4—Review—Rule 190—Gross irregularity—Practice.

H. *was charged before the Resident Magistrate with contravening section 72 of Act 15 of 1892 and was found guilty. He allowed the time to elapse within which an appeal must be made.*

On application by H. *to the Supreme Court for an order declaring that an appeal lay from the decision of the Magistrate as in a civil suit—or otherwise for leave to bring the proceedings in review under rule 190,*

The Court held (1) *That though proceedings under section 72, Act 15 of 1892, should be treated as a civil matter, the proceedings before the Resident Magistrate were as a fact brought in a criminal form, and that the applicant therefore not having appealed in the time prescribed by section 4, Act 21 of 1876, for criminal cases, had lost his right of appeal*

(2) *That though the proceedings were irregular yet, as apparently the judgment would have had to be much the same whether the proceedings had been taken in a civil or criminal form, there had not been such gross irregularity, nor was there such prejudice to the applicant as to entitle applicant to the benefit of the rule*

This was an application for an order declaring that certain proceedings under section 72, Act 15 of 1891, before the Resident Magistrate, Kenhardt, were of a civil nature; that an appeal lies therefrom; that leave be given to sue before the ensuing term; or in the alternative, for leave to bring the case under review in terms of rule of Court 190.

Mr. Innes, Q.C., for the applicant; Mr. Sheil (Assistant Law Adviser) for the respondent.

The applicant was summoned before the Periodical Court "upon the complaint and information of Gert Willemse and Jan Damara, who prosecute in the name and on behalf of Her Majesty that the said Haworth is guilty of having contravened section 72 of Act 15 of 1892, in that he did wrongfully and unlawfully and illegally impound" certain animals, the property of the said Willemse and Damara.

Before the Resident Magistrate, an attorney, Mr. Will, appeared "to prosecute on behalf of the complainants." The accused objected. Mr. Will then applied for the amendment of the summons by inserting the names of the complainants "as prosecutors." The accused consented. The Resident Magistrate found the applicant guilty and ordered him to pay the sum of £3 5s. for pound fees paid by complainants and costs arising from the illegal impounding.

Mr. Innes: The summons is under section 72, Act 15 of 1892, not under section 77. Section 72 does not constitute an offence—section 77 is the special one constituting the offence. Section 74 in effect also deals with illegally impounding, and if the charge had been laid thereunder the Resident Magistrate would have had criminal jurisdiction; he proceeds under 72, which deals with the civil aspect. The effect of making an offence criminal is that the right of appeal is more strictly limited. You must lodge in four days and prosecute in forty-one days. It is true we did not treat it as a civil case and give notice by the next Court day—but we couldn't treat it so, as it is *prima facie* criminal at present in view of the Resident Magistrate's procedure. We ask for relief as alternative—rule it civil and allow us specially to appeal before next term—or let us take out a summons under Rule 190. The irregularity is great on the face of the record. Willemse sen., appears as prosecutor on the record, but he now denies that he ever authorised this. Moreover the Resident Magistrate, after treating the matter as a criminal one in the summons, then proceeds to give a judgment which in effect is a civil judgment, especially as it entails further liabilities and costs. The case of *Queen* v. *Nathanson* (5 J., 109) shows right to apply for leave. To show how barred we are from appealing see *Snyders* v. *Theron* (10 J., 109), which was for contravention of section 30 (clearly a criminal section).

Mr. Sheil: The difficulty is to know why notice has been served on the Attorney-General. The case of *Queen* v. *Nathanson* shows that when

application to review under Rule 190 is made one of the grounds for review in section 5, Ordinance 40 of 1828, must be alleged. None of the causes have been assigned. If there is to be review on ground of gross irregularity, section 4, Act 21 of 1876, shows that the remedy by review is lost in same periods (4 and 41 days) as an appeal is.

Mr. Justice Maasdorp: But that has not hitherto been held in regard to summons under Rule 190.

Mr. Sheil: Not if there were a gross irregularity, but section 72 is clearly a penal section. The judgment was a very moderate one. If the applicant wished the Court to give leave to appeal he should have served notice on Damara, not on the Attorney-General. One cannot see what prejudice applicant has suffered. There was no alternative of imprisonment—the costs given in the judgment are the costs mentioned in the section—not the ordinary unliquidated costs, the costs arising out of the illegal impounding. Whether the proceedings are civil or criminal the complainants would be liable at least in what they have been ordered to pay.

Mr. Justice Maasdorp: Is the treating a case as criminal when it proves to be purely civil, a gross irregularity in the proceedings?

Mr. Innes: It is either that or excess of jurisdiction.

Mr. Justice Maasdorp: In an application of this kind the Court would be very willing to assist the applicant who complains of any irregularity in the proceedings of an inferior Court, where through lapse of time, and without any fault or neglect on his part, he has lost his right to appeal; if that could be done without prejudice to the rights of others. The applicant was charged with the crime of contravening section 72 of Act 15 of 1892; he was found guilty, and sentenced to pay to the complainants the sum of £3 5s. for pound fees, and costs arising from the illegal impounding. He now applies for an order declaring that an appeal lies from the decision of the Magistrate as in a civil suit, and granting leave to appeal during next term to this Court, or otherwise for leave to bring the proceedings in review under the 190th Rule of Court. Now whatever the nature of the injury complained of under the 72nd section of the Act, it is clear that it was treated by the Magistrate as a criminal offence, and all the proceedings were in a criminal form, including the conviction and sentence. The matter must therefore in every respect be treated as a criminal case and that part of the application must be refused where the applicant asks that it may be treated as a civil proceeding, wherein extension of time may be granted for him to prosecute his appeal. But then the applicant asks further for leave to take out a summons to have the proceedings brought in review under Rule 190. In my opinion the proceedings under section 72 of the Pound Ordinance should have been treated as a civil matter, and the remedy therein provided is merely one for civil redress allowed to persons who might have vindicated their rights under the common law, but are here furnished with a more expeditious means of recovering damages. For the alleged injury the parties could have laid their complaint before the Magistrate, and proceedings could have been taken, and the costs and damages recovered against the applicant in some form of action. That action should have been a civil proceeding, but in this case the proceedings were in a criminal form. Now it was open to the applicant, who was charged with an offence which was not a criminal offence under the law, to appeal to this Court against the conviction. But a certain period is allowed under section 4 of Act 21 of 1876 within which to make the appeal, and after which the right to appeal is lost. This time having expired, and applicant having lost his right to appeal, the question now arises should the Court grant the applicant leave to proceed under the 190th Rule of Court for review of the proceedings on the ground of gross irregularity. It might be considered hard upon him that proceedings should have been taken against him in a criminal instead of a civil form, but if they are allowed to stand he has only himself to thank for not moving to have them set aside on appeal. As far as the result of the proceedings is concerned, there is nothing to show that the applicant would not in any case, whatever the form of action, have been condemned to pay to the complainants the amount of fees and costs arising from the illegal impounding. Under the circumstances I think the irregularity was not of such a nature, and so prejudicial to the applicant that he should be allowed to take advantage of the 190th Rule. The application is therefore refused.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Hon. Mr. Justice MAASDORP.]

REGINA V. KLAAS. 1896. Oct. 12th.

The Chief Justice said this case had come before him as judge of the week. The defendant was charged before the Resident Magistrate at Williston with theft. There was not sufficient evidence in this case to support the conviction, and the conviction would be quashed.

PROVISIONAL ROLL.

OLIVIER V. POTGIETER.

Mr. Close applied for final sequestration of the estate of the defendant.
Granted.

ECKHARDT AND ANOTHER V. MCCALLUM.

Mr. Tredgold applied for final sequestration of the estate of the defendant.
Granted.

HUDSON, VREEDE AND CO. V. SAUNDERS.

Mr. Buchanan applied for final sequestration of the estate of the defendant.
Granted.

BRINK V. CALITZ.

Mr. Benjamin applied for provisional judgment on a judgment of the Resident Magistrate's Court for the sum of £16 7s., less £11 17s. 6d. paid on account, together with the sums of £6 and 14s. 9d. taxed costs and charges, and that certain property in the district of Oudtshorn be declared executable.
Granted.

GORDON AND GOTCH V. MCNALLY AND ANOTHER.

Mr. Buchanan applied for provisional sentence on three promissory notes of £10 8s., £10 6s. 8d., and £10 5s. 4d. respectively, dated at Aliwal North.
Granted.

DODD V. POWER AND ANOTHER.

Mr. Maskew applied for provisional sentence on a promissory note for £100 and interest.
Granted.

MOSTERT V. DE VILLIERS.

Mr. Benjamin applied for provisional sentence upon a judgment of the Resident Magistrate's Court at Van Rhyn's Dorp for £14 6s. 8d., with £3 0s. 3d. taxed costs, and £2 5s. costs of writ of execution, and that certain landed property at Van Rhyn's Dorp be declared specially executable.
Granted.

FLETCHER'S WHOLESALE V. MAHOMED.

Mr. Stoney applied for provisional sentence on two promissory notes together for £75 10s. 5d., less £20 paid on account.
Granted.

BEHR V. MUNRO AND ANOTHER.

Mr. Carstens applied for provisional sentence on a promissory note for £70, and interest from August 5, 1896.
Granted.

THE MASTER V. DU PLESSIS' EXECUTOR.

Mr. Sheil applied for judgment in terms of summons, calling upon the defendant to file account in terms of the Ordinance and costs.
Granted.

THE MASTER V. VILJOEN'S EXECUTORS.

Mr. Sheil applied for judgment in terms of the summons calling upon the defendant to file account in terms of the Ordinance, and costs.
Granted.

ILLIQUID ROLL.

SMITH V. SMITH. 1896. Oct. 12th.

Rule 319—Judicial separation—Consent paper.

Pleadings were filed in an action for divorce on the ground of adultery, brought by the wife,

to which defendant pleaded condonation, bringing a claim in reconvention for judicial separation.

The parties consented to judgment for judicial separation, division of the joint estate, &c.

The Court *gave judgment in terms of the consent paper.*

Mr. Graham applied for a decree of judicial separation in terms of the consent paper signed by the parties, which was as follows:

We, the undersigned, do hereby consent and submit to judgment being entered in the following terms:

1. For a decree of judicial separation *a mensa et thoro.*

2. For a dissolution of the community of property existing between us.

3. For a division of our joint estate.

4. For the appointment of John Howard Cosnett as liquidator of our joint estate, with power to realise the same and to pass transfer of the assets thereof, and after discharging any just debts due by such estate, and the expenses of realisation and liquidation, to distribute the net proceeds between us in equal shares.

5. For the plaintiff to have charge of the minor children.

6. For an order that the defendant (plaintiff in reconvention) in consideration of the plaintiff (defendant in reconvention) maintaining the said minor children, do pay to her the sum of three pounds sterling per month in respect of the three youngest children, the said sum to be reduced by one pound sterling, as each of the said children shall attain that age of fifteen years or die under the age, the first payment to be made on the 30th September, 1896.

7. For the payment of our respective costs out of the share accruing to each of us respectively.

The judgment was granted as prayed in terms of the consent paper.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorney, C. C. Silberbauer.]

SEABIGHT AND CO. V. FACTOR AND LAX.

Mr. Buchanan applied for judgment for the sum of £174, balance of account for goods sold, cash advanced, and services rendered.

Granted.

LE ROUX V. LE ROUX.

Mr. Tredgold appeared for the applicant.

Mr. Buchanan appeared as *curator ad litem.*

Mr. Tredgold said this was an application that Elizabeth J. C. le Roux, at present in Valkenberg Asylum, be declared of unsound mind, and that Mr. Gert C. le Roux be appointed *curator bonis* of her person and estate.

Dr. Dixon, acting medical superintendent at Valkenberg Asylum, said that Elizabeth C. J. le Roux was in the asylum, and was admitted on 29th May last. She was in a condition of absolute dementia, and had been an imbecile since childhood. She was also suffering from epileptic fits. She was in this condition when admitted. There had been no improvement in her state, nor was there likely to be. She was quite incapable of looking after herself or her estate. The patient was quiet. He did not think there was any chance of her recovery.

Mr. Buchanan stated that he had had an interview with the patient at the asylum, and he had come to pretty much the same conclusion as the doctor.

The Court granted an order declaring Elizabeth C. J. le Roux a person of unsound mind, appointing Mr. Gert C. le Roux curator of her person and property, and giving him leave to sell the property, and pay the proceeds to the Master; the Master to fix the amount to be paid for the maintenance of the lunatic.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Birset.]

ADMISSIONS.

Upon application from the Bar, the following admissions were made: Francis Gibson Reid, attorney and notary; Arthur Benjamin, attorney and notary; Johan Samuel Frederick Brink, attorney and notary; Octavius Septimus Vermooten, attorney; Jacobus Adrian Louw de Waal, attorney and notary; Arthur Wallace Steer, attorney, notary, and conveyancer.

REHABILITATIONS.

Upon application from the Bar, the following persons were rehabilitated: Andries Petrus Dipenaar, Richard Henry Bartlett, Julius Levy, James Kingston Cuthbert, Frederick William Baxter, Richard Dawson Jenner.

The application of William Thomas Joseph Hagan was ordered to stand over for six months.

IN THE ESTATE OF JOHN SCALLAN.

Mr. Graham applied for the rehabilitation of the insolvent.

Mr. J. Rose-Innes, Q.C., opposed on behalf of certain creditors on the ground of undue preference.

The Court said that opportunity had been given to the opposing creditor to state his objections. As to the bond, if there had been undue preference the proper course would have been to have the bond set aside. It was said the insolvent had cancelled certain items; and if he had, he might have been prosecuted for culpable insolvency. It was now sought to punish the insolvent in an indirect manner by refusing rehabilitation. To warrant this being done there should be something more tangible before the Court. The application must be granted with costs.

[Applicant's Attorney, R. Nelson; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

GENERAL MOTIONS.

PETITION OF HENTEBEK MAHUMA.

Mr. Close applied for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion, and for forfeiture by her of all benefits arising from the marriage in community.

The Court granted the order as prayed, returnable on the last day of next term, personal service if possible, failing which publication in the Aliwal North "Northern Post."

COLONIAL GOVERNMENT V. CRICKMORE.

Mr. Sheil applied for the attachment, *ad fundandam jurisdictionem* of this Court, of a certain farm known as Zannan's Lot, situated in the district of Maclear, Griqualand East, the property of the respondent, in an action about to be instituted against him by applicants for the recovery of an amount due in respect of the said farm.

The Court granted the order as prayed, returnable on the last day of term; one publication in the Johannesburg "Star."

IN THE ESTATE OF MARIA HITZEROTH. } 1896. Oct. 12th.

Transfer — Inheritance — Sale of interest under will—Landed property—Practice.

M. *died leaving a will in terms of which her children and her husband were instituted sole and universal heirs of her estate, her husband however being entitled under the will to retain sole possession and administration and enjoy the usufruct of her estate till his death.*

The husband and children all sold their interests under the will to various persons.

The movables had been realised and only landed property remained in the estate; the purchasers applied for transfer to be passed to them direct instead of first to the heirs and then to the purchasers.

The Court *refused to allow any departure from the established practice.*

This was an application on petition by J. H. Hitzeroth as executor testamentary of the estate of the late Maria Hitzeroth, Elizabeth Browne as executrix testamentary of the late W. E. Browne, W. R. Jecks, J. Robertson, J. A. Holland, J. Brister, Adam W. Guthrie and J. E. Matcham trading as Guthrie & Co., C. W. Alven, G. L. Galpin, F. R. Galpin, and L. H. Galpin.

The petition alleged that the late Maria Hitzeroth, the wife of J. H. Hitzeroth, died at Victoria West on 19th May, 1891, instituting the said J. H. Hitzeroth and their children, together with the children by her previous marriage (with J. F. Bernard), to be sole and universal heirs in equal parts, subject to the proviso that J. H. Hitzeroth was to retain, if survivor, the complete possession and administration of the estate till his death and enjoy all rents and profits.

He was appointed sole executor, and duly took out letters of administration.

There was one surviving child, E. J. C. Hitzeroth, issue of the marriage with Hitzeroth, and there were three children, F. C Bernard, M. E. C. Bernard, and M. J. C. Bernard issue of the marriage with Bernard.

On the 15th April, 1892, J. H. Hitzeroth sold (for an annual payment of £50) all his rights as an heir under the will to G. R. Perrins, W. R. Jecks, J. Robertson, and W. E. Browne jointly, and on the 20th April, 1892, for an annual payment of £150 and other consideration, he sold all his rights to the life interest and usufruct, the said purchasers still holding their rights at the time of the petition.

On the 13th May, 1879, F. C. Bernard sold to petitioner J. A. Holland, for £780, all his rights under the will.

On the 21st November, 1894, E. J. C. Hitzeroth sold to J. Brister and Dolley & Co., for £900, all her rights under the will, and Dolley & Co. sold to Guthrie & Co. their rights for £650.

On the 17th June, 1896, M. E. C. Bernard sold to C. W. Alven all her rights under the will for £1,400.

On the 13th July, 1896, M. J. C. Bernard sold all her rights to the petitioners Galpin for £1,350.

The movables were all sold, and the estate at the time of the petition consisted merely of certain landed property, on which there were three mortgage bonds (for £2 5 0, £360, and £3 0).

The prayer of the petition was that the Court should authorise the said J. H. Hitzeroth, as executor testamentary of the estate of Maria Hitzeroth to pass absolute transfer, and the Registrar of Deeds to allow such transfer of the several landed properties to the purchasers of the various interests in the estate as above set forth, in proportions agreed upon between the parties interested, who all consented to the proposed arrangement.

The Registrar of Deeds reported as follows: I am of opinion that transfer in this matter should be effected in the ordinary manner, viz., from the executor to the heirs and from the latter to the several purchasers.

The applicants do not submit any evidence tending to show that there is an actual necessity for the unusual course that they have adopted, and I have failed to discover cause.

Mr. Searle, Q.C., appeared for the petitioners, and said that the object of the application was not to evade payment of transfer duty, as all those who sold to the purchasers of the interests under the will were entitled to transfer free of transfer duty, but that the point was that the heirs had sold their rights to an inheritance which *happened* to consist of land but which was not sold as land.

The application was refused.

The Chief Justice: The Court is not satisfied that any real difficulty will arise in getting the transfers in the ordinary course in the present case, as it is admitted that the sellers can be got at for the purpose of serving a rule *nisi*, and this can be done. No doubt, in this case, this might entail expense and complications, but that is no reason why the Court should disturb the ordinary practice. I am not aware of any case where the Court has authorised transfer to be passed on the sale of an inheritance of this sort. In this case I do not see why the established practice should be departed from, seeing that it is quite possible to communicate with the heirs, and get the transfer in the ordinary way. There may be trouble and difficulty, but it is better to have this trouble and difficulty than that an established practice of the Deeds Office should be departed from. If further difficulties arise which cannot be surmounted a further application may be made.

[Applicants' Attorneys, Messrs. Scanlen & Syfret.]

SMUTS V. CATHCART DIVISIONAL COUNCIL. { 1896. Oct. 12th.

Divisional Council — Rates — Lien — Tacit hypothecation — Receipt — Transfer — Insolvent estate.

Where a person, who has bought land from an insolvent estate, tenders payment to the Divisional Council of road rates accruing due during his occupation, such Council cannot refuse acceptance of such rates and so prevent transfer of the land to him until all arrear rates due by the insolvent estate have been paid.

This was an application by Mr. N. E. Smuts upon notice of motion calling upon the respondent to show cause why he should not be compelled to issue a receipt showing that the rates last due on a certain farm called "Lowestoffe" in the district of Cathcart, have been paid, the amount of such last rate, viz., £13 18s. 4d., having been duly tendered and being hereby again tendered to the Council.

The applicant's affidavit was as follows:

I, Nicolas Everhardus Smuts, of Aliwal North, the above applicant, attorney at law, mak oath and say:

1. That on or about 20th April, 1895, I purchased a certain piece or lot of land situated in the division of Cathcart, field-cornetcy of Winterburg No. 2, being lot No. 1,087, called "Lowestoffe," from the Sheriff of the district of Albany for the sum of £1,650, which sale was afterwards confirmed by the trustee and creditors of the insolvent estates of Stephen Thomas Brown and James Samuel Brown.

2. That on the 15th January, 1896, the deponent sold the said farm called "Lowestoffe" to one William Brown for the sum of £2,800.

3. That it is now necessary to pass simultaneously the transfer from the said trustee to the deponent, and from the deponent to the said William Brown.

4. That by section 75 of the Divisional Council Act, 1889 (Act No. 40, 1889), it is provided that "before passing transfer of any immovable property within any division every Registrar of Deeds shall require the production of a receipt or other voucher showing that the rates last due to the Council of such division upon such property have been paid."

5. That on or about the 16th August, 1896, and again on or about the 21st of same month, the sum of thirteen pounds eighteen shillings and one penny (£13 18s. 1d.), being the amount of the rates last due, that is for the year 1896,

for the said farm "Lowestoffe" was duly tendered on behalf of the deponent to the secretary of the Divisional Council of Cathcart, who declined to accept same, or to issue a receipt or a voucher therefor, on the ground that certain arrears of rates extending over a period of some four or five years, and for which deponent denies liability, were still unpaid.

6. That on account of said secretary's refusal to issue such receipt or voucher, it is impossible to pass the transfers referred to in paragraph 3 hereof, and great inconvenience has already arisen, and serious loss may result from the delay in consequence of such refusal.

The secretary to the Divisional Council filed the following answering affidavit:

1. That I am the secretary of the Divisional Council of Cathcart.

2. That the farm Lowestoffe, No. 1,087, is registered in the books of the Divisional Council of Cathcart in the name of J. S. and S. T. Brown, and a sum of £55 12s. 6d. is due to the said Council for road rates on the farm, for the years 1893, 1894, 1895 and 1896, being a rate of £13 18s. 1½d., per annum for the four years.

3. That the rates on the farm Lowestoffe for the years 1893, 1894, 1895 were handed over to the Council's agents (Messrs. Elliott Brothers) for recovery; that they sued for the rate for the year 1893 in the Magistrate's Court at Cathcart, and judgment was given in favour of the Divisional Council for the sum and costs.

4. That the first mortgagee sued Messrs. S. T. and J. S. Brown for the amount of his bond, and the plaintiffs, who held further mortgages on the said farm, attended the sale of the farm, and offered the sum of £1,500. The Deputy Sheriff refused to accept the offer, stating that the reserve was fixed at, I believe, £2,000 (two thousand pounds sterling). Subsequently he purchased the farm at £1,650, and sold it for £2,800. The Messrs J. S. and S. T. Brown, upon the application of certain creditors, were made insolvent on the 12th day of September, 1895, when they had left the Colony, and had left no assets of any description.

5. I admit paragraph (5) of Mr. Smuts' affidavit in so far that I refused (acting upon instructions) to accept the sum of £13 18s. 1½d., for the rates on Lowestoffe, for the year 1896, on the grounds that the full amount of rates owing on the said farm was not tendered, that I could not grant a receipt for the rates for the year 1896, as by so doing, *it would be accepted as prima facie evidence that I had received payment for the former years.* I am also aware that it is the custom of the Civil Commissioners of the Colony not to grant receipts for the payment of quitrent (and which receipts it is necessary to lodge with the Registrar of Deeds when passing transfer, in a similar manner to road rates receipts) until all sums of quitrent, due for previous years, are paid, and I say further, that I mentioned this particular matter to the Auditor-General and he wrote me that all rates should be paid, before transfer could be passed, and I presumed that section 275 and other sections of Act 40 of 1889 were passed by Parliament for the protection of Divisional Councils, and that all rates should be paid before transfer of immovable property could be passed.

Mr. Schreiner, Q.C., for the applicant: Section 2, Act 40 of 1889, provides only for rates last due being required to be paid before transfer. It is not intended to allow the Divisional Council to collect *all* their arrear rates, for it is their duty to collect the rates each year as they become due. The Divisional Council will not give their receipt to enable transfer to be passed unless we pay all the arrear rates that are due for preceding years.

The Chief Justice: But the Legislature seems to assume that the previous rates have been paid.

Mr. Schreiner: We would of course have no standing if we had been the previous owners who owed the moneys: *Municipality Mossel Bay* v. *Holloway's Trustees* (3 J., 52); *Municipality Green Point* v. *Powell's Trustees* (2 Menz., 380).

Mr. Searle, Q.C., for the respondent: There is nothing in common or statute law to compel the Divisional Council to give the receipt. See *Van Noorden* v. *De Jong and Hofmeyr* (9 Juta, 298). If the Divisional Council had accepted the money they would be bound to give the receipt.

The Chief Justice: Is not this the substantial question—has the Divisional Council a tacit hypothecation?

Mr. Searle: Under section 269, sub-section (*b*), Act 40 of 1889, the occupier is not liable. The proper course is to sue the trustee for transfer. The application is misconceived—it purports to be brought under section 275.

The Chief Justice: The facts of this case are very simple. The applicant, having purchased certain land from the trustee of an insolvent estate, obtained occupation but not transfer of the land. During the period of his occupation a road rate became payable to the Divisional Council of Cathcart. He tendered the rate to the secretary, who refused to accept it or give a receipt for the same on the ground that arrear rates were owing to the Council. The 275th section of the Divisional Council Act of 1889

enacts that before passing transfer of any immovable property the Registrar of Deeds shall require the production of a receipt or other voucher showing that the rates last due to the Council have been paid. The applicant now seeks to compel the Cathcart Council to accept the money and give a receipt for the same, and the real question to be determined is whether the Council has a lien in the nature of a tacit hypothecation in respect of arrear rates. It has already been decided in this Court that neither Municipalities nor Divisional Councils enjoy any tacit hypothecation for rates without special legislative provisions to that effect, but it is contended that the 275th section of the Divisional Councils Act enables Councils to prevent any transfer of land without payment of all arrears of rates. If this contention be correct the respondent Council would undoubtedly enjoy a lien which is hardly distinguishable from a tacit hypothecation. The section, however, refers only to "rates last due" and leaves other arrear rates untouched. Can any Divisional Council then, by refusing to accept the rate last due, compel the payment of all other arrear rates before allowing transfer to be effected? If the rate last due is tendered by the person owing the previous rates the Council may certainly refuse to accept it. But the Court has to deal with a case in which the rate last due is tendered by a person who has bought the land from an insolvent estate, and who has himself incurred liability only for the last rate. The proper course for such a Council is to prove its claim upon the insolvent estate for the arrear rates, and to receive from the purchaser the rates accruing due since the date of his occupation. No question has been raised as to the form of the present proceedings, and as it is obviously desirable that the questions at issue should be determined as expeditiously and inexpensively as possible the Court will grant the order asked for with costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Hon. Mr. Justice MAASDORP.]

PETITION OF GEORGE F. W. KETT. { 1896. Oct. 13th.

Mr. Close applied for an extension of the return day of the edictal citation granted to applicant in the suit against his wife for restitution of conjugal rights, failing which for divorce, to enable him to provide funds for his wife's passage in case judgment should be given in applicant's favour.

The Court granted an order in terms of the application; extension of return day to May 16 next.

IN THE MATTER OF HENRY S. VYVYAN, AN ALLEGED LUNATIC.

Mr. J. Rose-Innes, Q.C., applied for the appointment of a temporary *curator bonis* to take charge of the cash and effects of the alleged lunatic, and also for the appointment of a *curator ad litem* to represent the alleged lunatic in proceedings about to be instituted to have him declared of unsound mind and incapable of managing his affairs.

The Court appointed Mr C. W. Adams temporary curator of the person and property of the alleged lunatic, and *curator ad litem* for the purpose of instituting an action *de lunatico inquirendo*, the summons to be returnable on the first day of term.

PETITION OF ISABELLA HOFMEYR.

Mr. Benjamin applied for leave to petitioner to raise a further sum of money on mortgage of certain land on the road to Rondebosch, Cape Division, her property, to enable her to build rent-producing cottages for the support of herself and her two minor children, she having been deserted by her husband, whose whereabouts are unknown.

The Court granted an order in terms of the application.

IN THE ESTATE OF THE LATE CAROLUS WILDSLAG.

Mr. Benjamin applied to make absolute the rule *nisi* issued under the Titles' Registration and Derelict Lands Act for transfer to the said estate of certain erf, No. 2 in block 8, in the village of Middelburg, at present registered in the name of C. E. Nordstrom.

but which is the property of the said estate, and was in the occupation of the said Wildslag from 1870 till his death in 1892.

The Court granted an order in terms of the application.

MURISON V. POOL.

Mr. Buchanan applied to make absolute the rule *nisi* for payment by the respondent of certain costs incurred by the applicant in obtaining possession of a certain horse wrongfully removed from his lawful custody by respondent.

The Court granted an order in terms of the application.

IN THE MATTER OF THE MINORS BONCKER.

Mr. Benjamin applied for authority to the mother of the said minors to dispose of certain landed property situated in Hope-street, transferred to her in trust for her children by her grandmother, the same being in a state of unrepair and a source of continual expense, while an offer has been made for the property which it will be in the interests of those concerned to accept.

The Court granted an order in terms of the Master's report.

THE UNION BANK.

Mr. Schreiner, Q.C., applied for an order in terms of the seventh report of the official liquidators as published.

The Court granted an order in terms of the application.

IN THE MATTER OF THE MINOR VAN DER MERWE.

Mr. Close applied for authority to the father of the said minor to pass transfer to him of his share of the farm Zuurplaats in the district of Graaff-Reinet, and to mortgage the same for his share of the bond thereon and other debts and expenses, in terms of an arrangement agreed upon by the major heirs and others interested.

The Court granted an order in terms of the Master's report.

In re MINORS COWLING. } 1896. Oct. 13th.

Parent—Minor—Trust property—Purchase by trustee.

C. *and* W. *jointly bought landed property for their minor children and the land was transferred to themselves in trust for the children. Subsequently* C. *bought from* W. *the half held in trust for* W.'s *child and obtained transfer of this also in trust for his own son.*

On application by C. *to be allowed to purchase the property at the value fixed by a sworn appraiser,*

The Court *authorised the purchase by* C., *the purchase price to be paid into the Guardians' Fund for the benefit of the minor.*

This was an application by one Cowling for leave to purchase in his own name certain property held by him in trust for his minor children.

The applicant's petition set forth:

1. That on the 12th September, 1891, a half share in certain land in the Cape Division was granted to petitioner in trust for his minor son.

2. That subsequently on the 29th February, 1892, the remaining half share was transferred to petitioner, also in trust for his son.

3. That the purchase price of the land was £80, which has been duly paid by petitioner out of his own resources.

4. That the land is of no value to the minor nor does he derive any profit from it, but rates and taxes have to be paid, and have been paid by petitioner out of his own resources up to the present time.

5. That it would be for the minor's benefit that the land be sold and the proceeds paid to the Master for the minor's benefit.

6—7. The petitioner will pay £110 for the land as its fair market value: that being the appraisement of Mr. J. J. Hofmeyr, sworn appraiser to the Court.

8. The minor is of the age of twelve years.

The prayer of the petition was for an order authorising applicant to transfer the property to himself on paying the sum of £110 into the Master's hands.

The Master reported on this as follows: The ground was originally purchased from the Government at auction under Act 15 of 1887 for £71, and titles issued in September 1891 to petitioner, and one Witycombe in trust for their minor children. Very soon after the latter obtained authority from the Court to sell the other half share which petitioner purchased for £40, also in trust for his minor son. Petitioner now discovers that the ground is of no benefit or value to the minor and prays that it may be transferred to himself.

If the property were put up to public auction it would probably fetch far more than the value placed on it: but if there is any profit to be

made out of it, the father by whose prosperity the children would benefit is the person most entitled to it.

In view, however, of the transactions that have taken place since the above properties were purchased ostensibly for the benefit of minors, I venture to think that in future in all such cases it would be much more satisfactory if the property were disposed of by public auction.

The Court granted an order in terms of the application.

Chief Justice: Under the special circumstances the Court will grant an order. The expenses of advertising and auctioneer's charges will probably outweigh the advantages of a public sale. As a general principle, the Court does not approve of a guardian buying his ward's land.

WALKER V. WALKER. { 1896. Oct. 13th.

Edictal citation—Domicile—Jurisdiction—Divorce.

Where it appears on the face of a petition for leave to sue by edictal citation that the defendant is not domiciled in the Colony, such leave will not be granted unless jurisdiction has first been founded by virtue of an arrest of the defendant or an attachment of his property.

This was an application for leave to sue by edictal citation for divorce on the ground of malicious desertion,

The applicant's petition set forth:

1. Your petitioner was married to her husband, Thomas Walker, before the Resident Magistrate of Graaff Reinet, on the 19th day of May, 1881. A certified copy of the marriage certificate is hereunto annexed. Your petitioner is a native of this colony and was at that time domiciled therein. Your petitioner's said husband was a travelling lecturer, who had been born in Preston, in Lancashire, and had resided or travelled in various parts of the world, having at that time, to the best of her belief, no fixed habitation or domicile.

2. Your petitioner and her husband lived together in this colony until about the month of November, 1881, when they left the Colony for Australia. They resided together at Melbourne in Victoria, until about March, 1884, and thereafter they resided at Sydney in New South Wales until March, 1893, when your petitioner left Australia and returned to Cape Town.

3. There have been born of the said marriage three children, namely a girl, Zaline Hypatia, aged twelve years; a boy, Eric Gysbert, seven years; and a boy, Roderick Vincent, aged five years.

4. When your petitioner returned to this colony the means to enable her to do so were provided by her relations. Half of the money sent for this purpose was used to pay the passage of petitioner and the second child, while the other half was retained by her husband, who promised to follow her in about three months with the two other children.

5. The said Thomas Walker did not follow the petitioner to this colony, nor has he sent her any money or any means whatsoever for her maintenance and support; on the contrary, your petitioner has supported herself and the second child by her own exertions, and has also remitted money to Australia for the two other children.

6. During the present year your petitioner has with the assistance of her friends remitted money to Australia for the purpose of having the oldest and youngest child sent to the Colony. These children arrived here at the end of July.

7. Your petitioner has now learned that the said Thomas Walker has left New South Wales, and has proceeded to Dunedin in New Zealand.

8. Your petitioner returned to this colony under the belief that her husband would follow her, but he has not done so and has deserted her. She is desirous of instituting proceedings against him for restitution of conjugal rights, and alternatively for divorce and for an order declaring that she is entitled to the custody of the children of the marriage, which action it is necessary to institute by edictal citation.

Wherefore your petitioner prays that this Honourable Court may be pleased to grant her leave to sue her said husband by edictal citation, and to issue instructions as to the manner in which notice of the citation shall be served upon him, and also that your petitioner may have leave to serve the intendit and of notice of trial together with the citation.

Mr. Close for the petitioner cited *Whipp* v. *Whipp* (5 Sheil, 225). The respondent was married here, this gives the only presumption we can get as to his domicile (viz., that he intended to fix his domicile here), for as he was a roving lecturer it is difficult to fix his domicile. This is only *prima facie* presumption. His domicile is not Australia, for as a matter of fact he has left Australia. The petitioner came here to her original home with his permission and by his order. He refused to come at the

time but promised to come later. Has he changed his domicile? If so it is for him to appear and except to the jurisdiction.

The Chief Justice: The facts disclosed in the petition do not justify the Court in granting the applicant leave to sue her husband by edictal citation. As far back as 1881 the parties met and were married in this country, the respondent being an itinerant lecturer. In the same year they left for Australia, where they lived together until 1893. In the latter year the wife, with the consent, it would appear, of her husband, returned to this colony, and she has been living here ever since. She alleges that he promised to follow her but failed to keep his promise. If the respondent had ever acquired a domicile in this colony, the fact that he and his wife remained absent from the Colony even for so long a period as twelve years would not have been conclusive proof of an intention to change their domicile. But there is no proof that the respondent ever acquired a domicile in this colony. He was no sooner married than he left for Australia, where he has remained ever since. The fact that he promised his wife that he would follow her does not prove a change of domicile unless he actually returned and established himself here. If he had brought his wife here and lived with her for some time there might have been some ground for granting this application. According to the established practice of this Court, leave is granted to sue an absent defendant by edict not only where there has been an arrest of his person or an attachment of his property to found jurisdiction, but also when the defendant has no last known place of residence in the Colony within the meaning of the Rules of Court. In *Protector Fire Assurance Company* v. *Erwin* (4 Juta, 91), where the defendant had left his last known place of residence seven years previously, the Court held that service at such place was insufficient and that the plaintiff should sue by edict. The ground of the decision was not that the defendant must be presumed to have changed his domicile but that there was no probability of his ever receiving the summons. Where it appears on the face of a petition to sue by edict that the defendant is not only absent from this colony but is not domiciled here, leave is not granted unless jurisdiction has first been founded by virtue of an arrest of the defendant or an attachment of his property. In the present case, the fact that the parties were married in this colony might justify an arrest of the defendant to found jurisdiction, but it would not justify the issuing of an edictal citation against a non-domiciled defendant without jurisdiction having been so founded. On the petition as it stands there will be no order.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

IN THE INSOLVENT ESTATE OF JOHANNES F. MARAIS.

Mr. Benjamin applied for an order appointing Johannes C. van den Heever and Constantine A. Schweizer to be joint provisional trustees of the said estate, with power to fully administer and liquidate the same, by reason that no election was arrived at at the second meeting of creditors for want of a majority of votes in number and value.

The Court granted an order in terms of the application.

IN THE INSOLVENT ESTATE OF EDWARD ALBERTYN.

Mr. Castens applied for the appointment of a provisional trustee to the said estate, with authority to finally administer and liquidate the same, no election having been arrived at at the second meeting of creditors held by the Resident Magistrate at Calvinia.

The Court granted an order in terms of the application.

REGINA v. ROBERTSON AND OTHERS. } 1896. Oct. 13th.

Game offence—Close season—Act 36 of 1886, section 5—*Particeps criminis*—Accomplice.

B. *while walking with dogs started a bushbuck, and proceeded to hunt it, though the period of the year was a close season in the district.*

R., *the occupier of the land, watched the hunt, and when the buck took to the water called on* M. *on the other side of the river to stop the buck; then pointed out to the men where the buck was hiding. They killed the buck and asked* R. *what they should do with it, when he told them they might keep it.*

R. *was charged with contravention of section 5 of Act 36 of 1886 and found guilty.*

On appeal the Court *sustained the conviction.*

This was an appeal from a decision of the Resident Magistrate, Knysna, in a case in which Robertson and four others (Barnards and Rollpes) were charged with contravening the provisions of section 5, Act 36 of 1886,

with killing a bushbuck on the 13th August of 1896, the period from the 1st August to the 31st January having been declared by the Government to be a close season in Knysna.

The prisoners were found guilty and Robertson was fined £4, while the others were fined 5s. Against this decision Robertson now appealed.

Mr. Graham for the appellant: Mr. Sheil (Acting Attorney-General) for the Crown.

From the evidence before the Resident Magistrate it appeared that the two Barnards were walking along a river bank with three dogs when the dogs started a bushbuck. The Barnards hunted it for a long while with Robertson watching them, till the buck took to the water. Robertson called on the Rollpes to stop it on the other side, which they did. They then killed the buck in the water after Robertson had pointed out to them where it was hiding. On their asking him what they should do with it, Robertson told them they might keep it.

The Resident Magistrate remarked upon the case as follows: Although the dogs taken into the bush by the Barnards appear undoubtedly to have started the buck there is no evidence of hunting or intention of hunting on their part. Barnard, a servant of Robertson, certainly ran along the margin of the bush to the river, but only after his master had called to him and pointed to the buck. Robertson, however, the occupier of the farm and virtually master of the men, called the two youths Rollpes as soon as he saw the buck, took active measures to ensure its destruction by first calling on Barnard, then running to the water's edge with him, then calling to the Rollpes to come up and head the buck, pointing out the very tree to them under which it was hiding. Lastly, he clearly proves himself to have been the master of the impromptu hunt by disposing of the venison.

The Court dismissed the appeal.

The Chief Justice: It is impossible to say from the evidence that the defendant did not assist in pursuing the buck; more especially as he had control of the hunt, and a word from him would have prevented the whole occurrence. The fine of £4 seems somewhat high, and I must say the temptation was very great for one having hunting instincts on seeing the buck in the water to assist in the hunt. The action might be unsportsmanlike, but that does not enter into the question; but that he did assist in pursuing the buck is perfectly clear. It is admitted that it was the close season. The appeal must be dismissed.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

In re THE SHIP "TASMANIA." { 1896. Oct. 13th.

Ship—Attachment—Damage to cargo—Jettison—Extension of protest—Security—Expenses—Costs.

Certain cases of acids were shipped on the T. *under a bill of lading providing that "if any chemicals . . . are shipped without being previously arranged for" they could be jettisoned at owner's loss.*

The master of the ship noted on the margin of the bill of lading "the master is not liable for the jettison of the twenty-six cases shipped on deck."

On the voyage the cases exploded and for the safety of the cargo were thrown overboard.

On arrival in port the master noted a protest, but refused to extend it unless it and the damage to cargo were paid for by the consignees.

An order for attachment of the ship ad fundandam jurisdictionem *was thereupon granted. On application by the master, however setting forth the facts,*

The Court *discharged the order.*

This was an application on motion for the discharge from arrest of the ship Tasmania, which on the previous day had been arrested at the instance of the respondents, Messrs. Wentzel & Schleswig, *ad fundandam jurisdictionem* in an action to recover the sum of £64 12s. 6d., the value of twenty-five cases of acids shipped for the applicants at Hamburg. The captain of the vessel stated that the acids leaked and exploded, and did damage to the ship to the extent of £6, and the acids were thrown overboard in order to ensure the safety of the ship. The captain refused to have the protest extended until the £6 damage was paid, and unless the costs of extending were paid.

The following was the affidavit of the master, Thorwald Christensen:

1. That I am the master of the sailing ship Tasmania, now lying in Table Bay under attachment by order of this Honourable Court.

2. That the said ship or owners are in no way liable to the abovenamed respondents in respect of the twenty-five cases of acids, as will appear from the terms of the bill of lading hereunto annexed.

3. That on the 31st day of July, 1896, while on the voyage the cases containing the said acids exploded and started leaking, whereby

the safety of the crew and ship were endangered, and in order to avert the imminent peril in which the ship was placed I caused the said cases of acids to be jettisoned.

4. That I have not refused to extend the protest noted by me on arrival here, but have always been ready and willing to do so, provided the respondents agreed to pay for such extension and the damage caused to the ship by the leakage of the said acids, amounting to £6. The respondents have never made any tender for the costs of extending the protest and refuse to pay the claim for damages.

The respondents filed an answering affidavit denying liability for the £6 claimed, alleging that the master had had ample time to sue in the Resident Magistrate's Court.

The bill of lading contained the following clause:

If chemicals or other goods of a dangerous nature are shipped without being previously arranged for, they are liable to be thrown overboard, and their loss, as well as any loss to the ship or cargo, will fall upon the shippers or owners of such goods.

To which a marginal note was added by the master:

The master is not responsible for washing overboard or jettison of the above twenty-six cases shipped on deck.

Mr. Innes, Q.C., for the applicants, refers to the bill of lading clause regarding chemicals; and to the notification in margin thereof. There is a clear contract as to liability for jettisoned goods. The master therefore simply proves that the cases exploded, and the result is that he has no liability. They have their remedy against the underwriters. We are willing to extend the protest if the owners or consignees are willing to pay. *Kay on Merchant Shipping* (Vol. I., page 253).

Mr. Searle, Q.C., for the respondents: We have had no opportunity to answer the affidavits. The onus is on the master to explain the jettisoning so as to justify him, either that there was inherent vice in the goods or the stress of weather. We object to pay their conditional claim of £6 damages.

The Chief Justice: Were the chemicals insured?

Mr. Searle: I believe so. We want the protest extended so as to enable us to go against the ship.

The Court ordered the order of attachment to be discharged.

The Chief Justice: It is quite clear from the information now before the Court that the order for the arrest of the ship must be set aside. The statement of the captain on oath is that on the 31st July, 1896, while on the voyage, the cases containing the acids exploded and started leaking, whereby the safety of the crew and the ship were endangered, and in order to avert imminent peril the cases were jettisoned. The captain was quite justified in doing this, and the course pursued by him is fully authorised by the terms of the bill of lading, which states that chemicals likely to be dangerous to the safety of the ship may be thrown overboard, and that loss or damage caused thereby must fall upon the shippers of the goods. It is clear, therefore, that the Court must order the attachment to be set aside. The only question now is that of costs. In the first instance the applicants did not wish to attach the ship, but asked for an extension of protest from the master in order to enable them to sue the assurers. The master refused this unless £6 damage done by the acids to the ship was paid to him. On that point I am not clear that the master was right. The only question now is as to who ought to pay for the extension of the protest; and it is quite clear that the applicants ought to pay for that, and they did not tender to pay for it, but supposing they were willing to tender the position taken up by the captain was, "I shall not do it unless you pay £6." It seems now to me that the captain would still have refused to extend the protest. Under these circumstances I do not think the applicants can be blamed for coming into court. They wanted some security to proceed against somebody. There will be no order as to costs, and the order of attachment will be discharged.

[Applicants' Attorney, G. Trollip; Respondents' Attorney, W. E. Moore.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

SMITH v. MORRISON. { 1896. Nov. 2nd.

Mr. Close applied for provisional sentence for £50, on a mortgage bond.

Granted.

THE MASTER v. TALBOT'S SURETIES. { 1896. Nov. 2nd.

Surety bond—Illiquid summons—Maladministration—Executor dative—Evidence of loss sustained by the estate.

S. *and* P. *as sureties and joint principal debtors signed a surety bond for the sum of £180 binding themselves in that amount for the due administration of an estate by* T., *the executor dative.*

T. *failed to file an account and had left the Colony and gone to Johannesburg.*

The Master sued the sureties provisionally for the amount of the bond.

Held *following* Wessels v. The Master of the High Court (9 Juta, 18) *and* The Master v. Werner and Others (4 Sheil, 418), *that the summons should have been in the same form as in illiquid cases and that there should have been evidence before the Court as to the loss sustained by the estate.*

Prayer for provisional sentence for the sum of £180 claimed on a surety bond executed by the defendants, James Montague Stone and Richard Percy Phillips, as sureties and joint principal debtors with one John Talbot, sen., who was appointed executor dative of the estate of John Talbot, jun., on the 25th July, 1894, for the due administration of the estate.

The only assets in the estate were two cottages in Graham's Town, and they were valued in the inventory filed by the executor dative at £180.

The executor dative having failed to file an account and having left the Colony for Johannesburg, the Master now sued the sureties for the amount of the bond.

Mr. Sheil appeared for the Master, and in moving for provisional sentence, pointed out that the practice which had been directed to be followed in *Wessels* v. *The Master* (9 Juta, 18) and *The Master* v. *Werner and Others* (1 Sheil, 418), had not been followed in the present case, because as no account had been filed it was impossible for the Master to say, with certainty, what the deficiency in the estate would be. The bond was based on the value of the assets as shown in the inventory filed by the executor dative.

The Chief Justice: In the two cases cited by Mr. Sheil the Court clearly pointed out the form in which claims similar to the present should be brought. As the practice laid down in these cases has not been followed in the present case, no order will be made on the summons.

[Crown Attorneys, Messrs. J. & H. Reid & Nephew.]

ABERDEEN DIVISIONAL COUNCIL v. MARE. { 1896. Nov. 2nd.

Mr. Schreiner, Q.C., applied for the final adjudication of defendant's estate.

Granted.

ADMISSION.

On the application of Mr. Clese, Edgar Lawrence Twentyman Jones was admitted as attorney, notary, and conveyancer.

REHABILITATIONS.

Mr. Joubert applied for the rehabilitation of Hendrik Jacobus van Heerden.—Order granted.

Mr. Maskew applied for the rehabilitation of Nicolaas van Wielligh du Plessis.—Order granted.

Mr. Buchanan made a similar application on behalf of Jacob van Reenen, who has been fourteen years insolvent.—Order granted.

Johannes Christian Rabie, represented by Mr. Benjamin, was also rehabilitated.

Mr. Jones applied for the rehabilitation of Daniel Martinus Malherbe.—Order granted.

KEMPSTER v. VYVYAN.

This was an action *de lunatico inquirendo* Mr. Graham appeared for the plaintiff, the nearest friend of the lunatic; Mr. Maskew for the *curator ad litem*.

Charles William Adams, broker, Cape Town, said he knew Henry Salisbury Vyvyan, who had now been in Valkenberg Asylum for about a month. He had been mine manager of the Robinson Deep Gold-mining Company, Johannesburg. He had seen him a few times since confinement; once after he had been in the asylum for ten days. He was then weak, unable to speak, and perfectly imbecile. The Union Steamship Company placed him in the asylum as soon as the steamer by which he had travelled from England reached here. He was possessed of some property in Johannesburg, but only about £65 in the Colony. Mr. Kempster had control of his property in the Transvaal.

By Mr. Maskew: On Saturday last he was a little better, being able to speak coherently for some short period. He (witness) would see that the defendant received all the luxuries, &c., that it was desirable should be given him.

Dr. J. F. Dixon, in charge of the Valkenberg Asylum during Dr. Dodds's absence, said that he remembered Vyvyan's admission. He was

them in a condition of acute mania. He was very emaciated, having lost a lot of flesh. He was about fifty years of age. His physical condition since admission to the asylum had improved, but mentally, though there was improvement, there was great incoherence, no lucidity of thought being yet apparent. He was unable to dress or feed himself, much less attend to business affairs. There was hope for him still, however.

By Mr. Maskew: His physical condition had improved even more than his mental condition.

Dr. W. J. V. Rowe, Wynberg, said he had known Mr. Vyvyan for some years. He had treated him professionally in Johannesburg for some time. He had seen him on four occasions since his admission to Valkenberg. On the first occasion Vyvyan was quite unable to recognise him. He had decidedly improved since then, especially physically. There was a very fair hope that he would improve. When he knew Vyvyan in Johannesburg he showed no symptoms of insanity, and he had not the least idea what had brought it on.

Order granted, declaring Vyvyan of unsound mind, and appointing Mr. Adams as curator of his property, costs to come out of the defendant's estate.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

GENERAL MOTIONS.

DIVISIONAL COUNCIL, ABERDEEN, V. MARÉ AND ANOTHER.

Mr. Schreiner, Q.C., applied to make absolute the rule *nisi* for an interdict restraining the respondents from selling or in any way alienating certain two erven, Nos. 15 and 17 in the town of Aberdeen, pending the decision of an action to be instituted to have it declared that the said erven are the property of Philip Arnoldus Maré.

Order granted.

THE PETITION OF JOHN G. CLEENWERCK.

Mr. Close applied for leave to sue by edictal citation in an action against petitioner's wife for divorce by reason of her alleged adultery, and for forfeiture by her of any benefits accruing to her by virtue of the marriage in community.

Leave was granted, the citation to be returned on November 24. The intendit to be served with the citation.

THE PETITION OF THE TRUSTEES OF THE DIOCESE OF CAPE TOWN.

This was the return day to a rule *nisi* granted on the 1st September, 1896.

Mr. Searle moved to make the rule absolute authorising the transfer to the purchasers of certain lots of the Lelicbloem Estate, proposed to be sold for the purpose of providing funds to repay advances made to the institution known as the House of Mercy, and for the future maintenance and advancement of the objects thereof.

Order granted.

THE MUTUAL HALL COMPANY OF EAST LONDON.

Mr. Graham presented the first and final report of the official liquidators.

The usual order was granted, to be published in the "Cape Times," "East London Dispatch," and "Government Gazette."

THE PETITION OF JOHANNES L. VAN JAARSVELD.

Mr. Jones applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of certain lot of ground, being lot No. 5 in the town of Middelburg, purchased by him in 1882 but never transferred, the previous owners being dead or their whereabouts unknown.

Order granted.

THE PETITION OF JOHANNES J. VERTRAAN.

Mr. Tredgold applied to make absolute the rule *nisi* for registration in the name of petitioner of certain one-fourth share of water erf No. 4, situate in the town of Middelburg, the same having been purchased from the estate of Robert Wilson but never transferred, and the whereabouts of the executrix being unknown.

Application granted.

IN THE MATTER OF THE MINORS BOSCH.

Mr. McGregor applied for authority to the Master of the Supreme Court to pay out of moneys to the credit of the said minors in the Guardians' Fund from the estates of their deceased parents an annual allowance for three years in support of their maintenance and education.

Order granted.

THE PETITION OF THE WELLINGTON MUNICIPALITY.

Mr. Buchanan applied to make absolute the rule *nisi* issued under the

Titles Registration and Derelict Lands Act for the attachment and sale in execution for the rates due thereon of several lots of ground in the Municipality left derelict and abandoned by the owners thereof.

Order granted.

IN THE MATTER OF THE MINORS LOUW.

Mr. Schreiner, Q.C., applied for authority to the Master of the Supreme Court to pay out from moneys to the credit of the said minors in the Guardians' Fund sufficient to enable them to satisfy the bequest amount and expenses of certain shares of the farms Tweekuilen and Klipfontein, in the district of Malmesbury, bequeathed to them by their parents.

Order granted in terms of the Master's report.

GELDENHUYS V. KUILDER. { 1896. Nov. 2nd.

Party to suit—Evidence—Magistrate's discretion—Act 4 of 1861, section 8.

In an action in a Magistrate's Court for the price of goods sold and delivered the defendant admitted the debt in court. The plaintiff accordingly gave no evidence but, as he had come from his farm to the Court for the purpose of giving his evidence in case the defendant should deny his debt, the Magistrate allowed his expenses as a witness under the 8th section of Act No 4 of 1861.

Held, *on appeal, that there was no ground for interfering with the Magistrate's discretion.*

This was an appeal from the judgment of the Resident Magistrate of Willowmore.

In the action before the Resident Magistrate, the appellant was sued by respondent for £28 5s. 6d., for goods sold and delivered, and cash advanced.

The defendant took exception to the jurisdiction of the Resident Magistrate's Court, contending that by Act 20 of 1856 the Magistrate's jurisdiction is limited to £20, except as provided for in Act 43 of 1885, by which the jurisdiction is extended to £100 for the recovery of the price of any merchandise, goods or other movable property, and in this case the amount of £28 5s. 6d. is made up of goods sold and delivered intact, cash advanced, and commission, which cannot be considered as the price of any merchandise, goods or other movabl property.

Plaintiff's agent agreed to amend the summons by striking out from the account the items of interest and commission. The defendant's agent agreed to this and withdrew his exception on condition that the plaintiff pay the costs of the day, which was agreed to. The amount of £3 1s. 6d. was struck out of the account. Defendant agent then admitted the debt. Judgment for plaintiff for £25 4s. with costs.

Plaintiff's agent applied for the costs of plaintiff on the ground that he has been compelled to come to court, a distance of forty-two miles from Willowmore, whereas the defendant only lives six miles from plaintiff and had ample time to admit the debt after issue of demand.

The Court under the circumstances and knowing the relative positions of the parties uses its judicial discretion, as provided for under section 8 of Act 4 of 1861, and allows the plaintiff his costs.

Mr. Jones for the appellant argued that Act 4 of 1861, section 8, only allows the Resident Magistrate to exercise his discretion (as to whether plaintiff was a necessary witness), where witness has been actually called not otherwise. See *Walworth* v. *Kennedy* (2 E.D. p. 199).

The Chief Justice: That case seems against you. The Court would apparently have given the witness expenses even though he was not called.

Mr. Jones: In any case, in this matter there is the question of the condition on which the amendment was allowed. There is nothing on the record to show that plaintiff would be a necessary witness.

The Chief Justice: The costs of the day surely include only counsel and attorney and the witness's expenses for the day, not the travelling expenses for the witness to appear on that day.

Mr. Jones: There is a privilege given by statute, it must be strictly construed. See Rule 315, sub-section 14. "Adducing" as witness means calling and putting in the box.

The Chief Justice said: It appears that the plaintiff had come all the way from his farm to the Magistrate's Court for the purpose of giving his evidence in case the defendant should continue to deny his debt. He was in Court, ready and willing to give his evidence, but his evidence was rendered unnecessary by the defendant's admission in court that the amount claimed as the price of certain goods was due. He did not, it is true, formally tender his evidence, but such a tender would

have been wholly nugatory, seeing that the Court would not require it and the defendant by his admission had dispensed with it. The plaintiff did not offer to step into the box to give his evidence, but was he adduced as a witness in terms of the 8th section of Act 4 of 1861?

In my opinion he was, if the facts as I have stated them were correctly found by the Magistrate. But it is said that there is no proof that he was a necessary witness.

The Magistrate, however, found that he was, and in the absence of proof to the contrary it may fairly be held that the vendor of an article is a necessary witness in an action for the price—more especially if the terms of the sale were not in writing. This is not a case for interfering with the Magistrate's discretion and the appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

VAN WYK v. WILDRIDGE { 1896. Nov. 2nd.

Derelict lands—Act 28 of 1881—Griqua emigrant claims—Sale of application documents—Griqualand East Land Board certificates—Possession—Rule *nisi*—Concealment of material facts.

P., *a Griqua emigrant, under Adam Kok, made application (on the annexation of Griqualand East) to the Land Board for a grant of land. Though the application was refused he sold his rights under it to* J., *who took no further steps.*

Subsequently the Land Board granted the application and he then sold his rights to W., *who paid the survey and transfer expenses and arranged as to obtaining transfer to* P. *and to himself.*

P. *left the Colony and transfer could not be passed.* J.'s *executrix claimed title under Act 28 of 1881 and obtained a rule* nisi. *On the return day.*

The Court *discharged the rule on the ground that though the sale to* J. *was earlier than that to* W., *yet that* W. *had taken steps to secure his title and had possession of the land and the title deed, which facts had been concealed when the rule was granted.*

This was an application for the making absolute of a rule *nisi* granted under Act 28 of 1881, upon the petition of Troy van Wyk, of Kokstad, in her capacity as executrix dative in the estate of the late Jan van Wyk, S.son, which set forth:

1. That your petitioner is Troy van Wyk of Kokstad, widow of the late Jan van Wyk S.son.

2. That the late Jan van Wyk departed this life in August, 1879, and your petitioner was on the 14th day of January, 1887, appointed executrix dative in the estate of the late Jan van Wyk.

3. That in or about October, 1875, one Plaatje van Wyk, at that time a resident of Kokstad, East Griqualand, applied to the special Land Commission, and thereafter to the Land Board sitting under the presidency of Captain Blyth in 1877, and again to the Land Board in October, 1879, sitting under the presidency of Mr. Charles Brownlee, Chief Magistrate of East Griqualand at the time, which application was favourably considered and approved of by the said Land Boards and the said Plaatje van Wyk was recommended to the Colonial Government for a grant of 500 acres.

4. That on the 3rd day of March, 1876, the said Plaatje van Wyk sold his application form and all his rights accruing thereto and thereunder to the late Jan van Wyk, S.son, for the sum of fifteen pounds sterling, as will be seen on reference to the deed of sale hereunto annexed.

5. That on the 24th day of April, 1880, the Colonial Government confirmed the recommendation of the Land Board on the application of Plaatje van Wyk and issued a grant granting the farm Altona No. 158c, situate in the district of Mount Currie, East Griqualand, in extent 1,263 morgen, to Plaatje van Wyk, Hans Lubbe, and Thos. Baatjes.

6. That the said Plaatje van Wyk left East Griqualand in or about December, 1879, and never returned.

7. That the said Plaatje van Wyk was last heard of in the Orange Free State, but his present whereabouts are unknown to your petitioner.

8. That at the time of the purchase of the application form of Plaatje van Wyk by the late Jan van Wyk, the deed of sale and application form were handed over by my late husband to one Piet Bezuidenhout, with instructions to watch over his interests and compel the said Plaatje van Wyk to fulfil his obligations under the deed of sale as far as lay in his power.

9. That the estate is entitled to Plaatje van Wyk's share of the farm Altona, situate and granted as aforesaid.

10. That the executrix of the said estate of Jan van Wyk, S.son, is desirous of obtaining transfer of an undivided one-third part of share of the farm Altona.

11. That the documents such as they are, though sufficient to prove the sale by Plaatje van Wyk to the late Jan van Wyk, are yet insufficient to comply with the rules and regulations of the Office of the Registrar of Deeds, Cape Town.

12. That your petitioner has no other means of obtaining transfer to the said estate of Jan van Wyk of the said piece save under the provisions of Act 28 of 1881.

The petitioner obtained a rule *nisi* under the provisions of the Act.

The following was the Application Document referred to:

"Plaatje van Wyk begs to apply to the Special Commissioner for a grant.

"He came from Philippolis with Kaptyn Kok.

"Kokstad, 13th October, 1875.—Jan van Wyk bought this land, £15, 3rd March, 1876. Jan van Wyk died in August, 1879. His wife desires to sell now.

"Approved applicant for 500 acres. *Vide* Captain Blyth's list.—C. M. HAWTHORN, 4th October, 1879.

The "Deed of Sale" referred to in paragraph 4 above ran thus:

"I the undersigned, Plaatje van Wyk, hereby declare to have truly and legally sold my application to Mr. Jan van Wyk, L.son, for the sum of (£15) fifteen pounds sterling, which I have received this day.

"I further consider myself under obligation to all demands and quittances in the matter, and I make no claim to the application, no more claim for ever.—3rd March, 1876."

The making absolute of the rule *nisi* was opposed by Mr. J. P. F. Wildredge, who made affidavit:

2. That in 1879 I carried on business as Pringle & Co.

3. That on the 26th day of November, 1879, I purchased from Plaatje van Wyk all his right, title, and interest in and to a certain grant of land made in his favour by the Land Board sitting at Kokstad on October 4, 1879, under the presidency of Charles Brownlee, Esq., Chief Magistrate of East Griqualand, for the sum of £35, which said sum has been duly paid, as will appear from the certified copy of the declaration of seller hereunto annexed, and the power of attorney to transfer.

4. That the members of the said Land Board at that time were:

(*a*) The Honourable Charles Brownlee, Chief Magistrate of East Griqualand.

(*b*) Charles Philip Watermeyer, Chief of the East Griqualand Survey.

(*c*) George W. Hawthorne, Resident Magistrate of Kokstad.

5. That shortly afterwards I applied to Mr. C. P. Watermeyer, Chief of the East Griqualand Survey, with a view to having the said grant allotted, and at the same time handed to him a certificate granted by the said Land Board to the said Plaatje van Wyk.

6. That I then arranged and agreed with the said C. P. Watermeyer, that this said grant should be included in farm No. 158c, which said farm was not then named, and which I then and there named "Altona."

7. That thereafter on the 9th day of January, 1880, I wrote to the said C. P. Watermeyer making formal application for the particular grant of land to be included, in conjunction with two other grants of land which I had purchased from Hans Lubbe and Thomas Baatje, within the area of the said farm Altona, at the same time undertaking to produce a further certificate in conjunction with the said farm (press copy of the letter annexed).

8. That thereafter on the 15th day of July, 1880, I applied to the Chief Magistrate of East Griqualand, the Honourable Charles Brownlee, for the title deed of the said farm Altona, which said title deed was handed to me and for which I paid the sum of £33 13s. 10d. for survey charges, stamps on title deeds, and office fees.

9. That at the same time I paid the transfer duty to the said Chief Magistrate, upon the said sale by the said Plaatje van Wyk to me, as will be seen from the certificate hereunto annexed.

10. That about the same time I took possession of the said farm Altona, and have from date been in full, free, and undisturbed possession and occupation of the said farm, and have held the title deed of the same without any claim from any person whomsoever, more especially from and on behalf of the said Troy van Wyk.

11. That in July, 1879, I purchased from the late Jan van Wyk a certain erf situate in Kokstad.

12. That no executor had at that time been appointed in the estate of the said Jan van Wyk, and the title deed of the said erf having been made out in favour of the legal representative of the estate of the late Jan van Wyk.

13. That the said Westcott M. Morris subsequently informed me that he had arranged with the said Troy van Wyk that she should be appointed executrix dative of the estate of the late Jan van Wyk, in order to pass transfer of

the said erf to me, and the transfer of the said erf was duly made and effected into my name.

14, 15, 16. That I saw the said Troy van Wyk at that time and she did not make any claim in connection with the abovementioned grant of land, but stated that her husband had left no property of any description at the time of his decease.

17. That in March, 1881, I forwarded the documents to effect the transfer in my name of the undivided share or portion of the said farm Altona from the said Plaatje van Wyk to me to Messrs. Fairbridge & Arderne, of Cape Town, for the purpose of having the same duly transferred in my name.

18. That owing to the fact that the said documents were not sufficient to meet the requirements of the Office of the Registrar of Deeds, I was unable to obtain transfer of the said share of the said farm to my name.

19. That owing to the absence of the said Plaatje van Wyk from this country since the month of December, 1879. I have been unable to obtain fresh and correct documents from him in order to effect the said transfer to me.

20. That recently I heard that the said Plaatje van Wyk is a resident in the Orange Free State, and I therefore instructed Edward Herbert Jellicoe to take steps to procure the necessary documents from the said Plaatje van Wyk, and failing his being able to trace the said P. van Wyk, then to take steps to obtain an order of Court to effect the said transfer to me under the provisions of the Titles Registration and Derelict Lands Act of 1881.

Mr. Searle, Q.C., appeared for the petitioners; Mr. Close appeared for J. P. Wildredge.

After argument by Mr. Searle, (Mr. Close not being called upon),

The Chief Justice said: At the time when the rule *nisi* was applied for there was *prima facie* evidence in support of the rule. There was the fact that Plaatje van Wyk had sold the ground to the applicant, and the further fact that the applicant possessed the original application document for the farm, with the endorsement of a certificate by Mr. Hawthorne to the effect that the farm had been granted to Plaatje van Wyk. But it now appears that after these documents had been given to the applicants, the property had been sold by Plaatje van Wyk to the respondent Wildredge, and not only had the property been so sold, but Wildredge had taken all the proper steps to effect a proper obtaining of title in favour of Plaatje van Wyk, and had paid all the sums necessary for the purpose of giving transfer to Plaatje van Wyk. Mr. Searle contends that proper proof of ownership is the certificate, but I consider that the formal title issued in favour of the person entitled is the better evidence. It is the completion of the title given by the original certificate, and that certificate ceases to have any validity when once that formal title is given in favour of Plaatje van Wyk. That title is in possession of the respondent, and not only that, but he is in possession of the land. The applicant knew these facts; at all events, applicant knew that the respondent Wildredge was in possession of the property when she made the application to the Judge in Chambers, and nothing of the kind was mentioned to the Court. I am satisfied that if the Judge had known the facts then known to the applicant he would not have granted the order. I do not say it was intentional concealment, but it was concealment of the real facts which should have been known. The applicant's purchase is indeed prior to the respondent's, but respondent has gained possession of the ground and taken all steps necessary for the purpose of getting formal possession. From the circumstances before the Court now the respondent appears to have a better right to the land, and the applicant has failed to prove that she is entitled to the form of order asked. The rule will therefore be discharged with costs.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SCHAAP v. SOLOMON. } 1896. } Nov. 2nd.

Interdict — Trespass — Cessation — Admission of injury—Further proceedings—Costs.

O. *trespassed on* C.'s *land, whereupon* C. *took legal proceedings to obtain an interdict against* O.

O. *thereupon admitted that he was not entitled so to trespass and promised cessation of the injury. Nevertheless* C. *continued the legal proceedings.*

The Court *refused the interdict and granted costs up to the date of the admission and promise only.*

This was an application on motion for an interdict to restrain respondent from trespassing on portions of the farm Vlakteplaats, in which the applicant and respondent both owned shares.

The affidavit of Pieter Abraham Schaap, the above applicant, was as follows:

1. That deponent is part proprietor of the farm Kruisriver, generally called Vlakteplaats,

situate in the division of Oudtshoorn, and is likewise the lessee of another share of the said farm.

2. The farm Vlakteplaats has been divided by arbitration, and is held and occupied in defined shares, although no sub-divisional transfers have yet been effected.

3. The respondent owns and occupies another defined share in the said farm.

4. That during the month of May last past, the respondent by himself, his servants and representatives, trespassed on the defined share in the said farm leased by deponent by driving over the same in vehicles and proceeding on foot and climbing certain walls there existing.

5. That deponent thereupon caused notice to be served on said respondent calling upon him to desist, threatening legal proceedings.

6. That deponent was thereafter informed by the attorney of the said respondent, to whom deponent stated that he intended applying for an interdict, that respondent would not repeat his trespass. Deponent thereupon dropped proceedings.

7. That on divers occasions during the months of August and September, respondent by himself, his servants and representatives, repeatedly trespassed on the defined share in the said farm so occupied by deponent as aforesaid, by driving over the same by wagon and cart, proceeding on foot and climbing over his walls, to deponent's serious annoyance.

8. That deponent apprehends serious disturbances and therefore comes to this Honourable Court for relief, praying that it may please your lordships to grant an order restraining the respondent, his servants, representatives or agents, from trespassing on the land aforesaid lawfully occupied by the deponent, or that your lordships will grant him such further relief as to this Honourable Court may seem meet.

Herman Solomon the above-named respondent, filed the following affidavit,

1. That deponent was on the 27th September last served with a copy of the affidavit of the applicant sworn to on the 15th day of the same month.

2. That deponent admits the allegations contained in paragraphs 1, 2 and 3 of the applicant's affidavit and says further that he occupies, besides the share of the said farm Vlakteplaats owned by him, certain other defined share thereof hired by him from one Johannes Hendrik Schoeman.

3. With regard to paragraphs 4, 5 and 6 of the said affidavit, deponent says that prior to the month of May last he, his servants, and the public generally made use of a certain road leading to the property hired by him as aforesaid.

4. Applicant in the month of May aforesaid hired the defined share of the said farm over which this road passed and forthwith prohibited deponent, his servants, assistants, and the public from using this road, which deponent found after inquiry had always up to that time been used as a public road.

5. Applicant then threatened to apply for an interdict against deponent to restrain him from using this road, and it was then that deponent instructed his attorney to inform applicant that deponent was only a lessee of the land, in connection with which this road was used and did not intend incurring any costs in the matter, and that he undertook not to make any use of the road aforesaid after that time, and deponent has not, neither have any of his servants or any other person acting under his authority or with his concurrence, used the said road since that time, nor does deponent now claim the right to use the said road.

The affidavit denied subsequent acts of trespass except on one or two occasions where his servants accidentally trespassed without his knowledge.

Mr. Searle, Q.C., for the applicants argued on the facts.

Mr. Schreiner, Q.C., for the respondents referred to *Mostert* v. *Smith* (1 Ros., 24); *Van Leeuwen*, Roman-Dutch Law (p. 429, Vol. II., Kotzé's trans.); and argued that respondent should not be liable for costs, as applicant had quite misconceived his remedy.

The Chief Justice, in giving judgment, said: The clear impression left on my mind by the affidavits is that if the applicant had not applied to the Court for an interdict the respondent would have continued his course of trespass on the land. In my opinion the applicant was justified, upon the information before us, in applying for an order to interdict the trespass. It was an injury to him. The extent of the land was very small, and it is difficult to say what compensation he would have been entitled to if this land had been continually trespassed upon by the respondent. But when the respondent comes to make his affidavit he makes an unqualified admission that he is not entitled to trespass on the land, and promises not to do so in the future. In my opinion the applicant should have been satisfied with this admission and promise. It is not the practice of the Court to grant an interdict where there is a clear undertaking on the part of

the respondent not to continue the trespass. Of course the Court will look at the acts of the respondent, and if by his acts subsequent to the promise and admission the respondent shows that he intended to continue his trespass the Court will not look at his words, but at his acts. But in this case the only clear proof is of one trespass afterwards, which was quite unintentional and unknown to the respondent himself, being the act of one of his servants. Under these circumstances, I think that the application ought to be dismissed; but that the applicant should have costs up to October 9 (the date of the affidavit containing the promise and admission) and should pay all costs subsequent to that date.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G., P.C., Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

DU TOIT v. BEUKES. { 1896. Nov. 3rd.

Pleading—Nonjoinder—Trespass.

The owner of certain land gave certain grazing rights thereon to N.

In an action brought in the Magistrate's Court by the owner against the defendant, who had trespassed on the land, exception was taken that N. *ought to have been joined as co-plaintiff with the owner,*

Held, *reversing the Magistrate's judgment, that the interests of the plaintiff and* N. *were sufficiently diverse to entitle the plaintiff to sue alone.*

This was an appeal from the decision of the Resident Magistrate, Britstown.

Du Toit, the plaintiff in the original action claimed £20 damages for trespass; defendant's sheep, to the number of between 400 and 1,200, having grazed at different times on plaintiff's veld.

Before the Magistrate the defendant excepted to the summons on the ground that the plaintiff had no *locus standi*; inasmuch as he was not the owner of the farm Zoutwater when the alleged trespass was committed, the said farm being the property of his wife, to whom he is married out of community of property.

The plaintiff Du Toit in his evidence stated *inter alia*:

"Mr. Nolte is tenant of portion of my farm, nearly half. He has six or seven hundred small stock. There is no agreement as to the number he has to keep; he pays £25 rent per annum. We have equal rights over the spare veld, this is in terms of our verbal agreement. The spare veld I refer to is the same veld over which defendant's sheep trespassed."

The agent for the defendant at this stage of the proceedings applied for absolution from the instance with costs, on the ground that it appeared from the evidence then on record that the present plaintiff had no *locus standi*, inasmuch that it appeared from his evidence that the particular portion of "spare veld" had been leased in such a way to one Nolte that the lessee had an equal grazing right to the same and should have joined in suing.

The plaintiff's agent then examined plaintiff on the point in question. Plaintiff then said: "Nolte is a "bywoner" he does no work for me. There are certain beacons erected showing which portion of the farm Nolte has leased. The piece of ground on which trespass has been committed is outside the beacons of Nolte. his sheep were never on this spare veld. My agreement was this: I pointed out a certain piece of ground where Nolte could graze, and I told him I reserved a piece of veld for lambing ewes, and 'when your sheep lamb I will allow you to put your lambing ewes there also.' His sheep have not lambed yet."

The Magistrate thereupon gave judgment of absolution from the instance.

Mr. Schreiner, Q.C., for the appellant: The Resident Magistrate is clearly wrong in holding that because the owner has let to "bywoners" that therefore he cannot take ordinary remedies for trespass. The converse of this present case was decided in *Maasdorp* v. *Malan* (Buch. 1875, page 136). See also the case of *Wilson and Hall* v. *Wessels* (8 J., 171).

Mr. Searle, Q.C., for the respondent: The question is, whether parties who have a joint interest in land should not both be joined in suing? *Malan's case* is justified by the fact that the plaintiff was the only one who was entitled to possession. *Strydom* v. *Theron* (Buch. 1873, page 83) was decided on grounds which show that the real test as to who should

sue is "who is actually entitled to possession at the time?" for the one entitled to possession is the one entitled to sue for trespass. *Dicey* (On Parties to an Action, pages 383-4-5), lays down this rule—but that possession means *exclusive* possession. See also page 507 (rule 117 there given). The plaintiff in this case is the owner but he has given equal rights to Nolte over the land trespassed on. The plaintiff has not sole right to possession or occupation. It seems the proper course that both the persons who could sue should do so together and not harass defendant with separate actions.

Mr. Justice Buchanan: But suppose one party refuses to join as plaintiff.

Mr. Searle: He might be joined as co-defendant merely for the purpose of having him before the Court.

The Chief Justice: But the two persons here seem to have separate interests. The "bywoner" had vague rights given him, but he was not in occupation of the part trespassed on.

Mr. Searle: Yes, but he had rights over a definite part of the farm. It is not a precarious tenure: and though not in possession he has right to go there, and has paid £25 per annum for it. Nolte has action against defendant because under his lease he is entitled to this portion of the farm, and he is as much technically in occupation as the owner is.

The Chief Justice: Is there anything but a servitude granted to Nolte over the spare veld?

Mr. Searle: It is appurtenant to the lease of the specific part and neither plaintiff nor Nolte can alone use it now: under the original agreement each has equal rights over the spare veld.

The Chief Justice said: If the interest of the plaintiff and Nolte had been in all respects identical, there would have been some force in Mr. Searle's contention that they should jointly sue the defendant for any trespass committed by him upon the land. The plaintiff was the owner, and as to Nolte his interest is briefly thus stated by the plaintiff: "My agreement was this. I pointed out a certain piece of ground where Nolte should graze, and I told him I had reserved a piece of veld for the lambing ewes, and when his ewes should lamb I would allow him to put his lambing ewes there also. These sheep have not lambed." Nolte was not in occupation, and the utmost right he can be said to have had was a personal servitude of grazing his sheep on the land. Even if he had a right of action against the defendant, it was quite distinct from the plaintiff's right as owner. The Magistrate, in my opinion, was mistaken as to the rule of pleading, and his judgment must be reversed and the case remitted to him to be tried on its merits.

Their lordships concurred.

Mr. Justice Buchanan said: I would like to say, as far as at present advised, I would hold that, even if their interests were identical, the plaintiff would be entitled to defend his right in the land, though his limited interest might affect the damages which the Magistrate would award.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, P. de Villiers.]

HEYDENRYCK V. FOURIE. { 1896. Nov. 3rd.

Pledge—Delivery—Possession—Attachment in execution—Interpleader.

The pledgee of a cart and horses obtained delivery of the same but afterwards allowed the pledgor to obtain possession of the same for the purpose of carrying on his (the pledgor's) *business as post contractor.*

The cart and horses having been attached at the suit of an execution creditor, held, *that the pledgee was not entitled to claim them as against such creditor.*

This was an appeal from the decision of the Resident Magistrate of Jansenville in an interpleader suit, in which the appellant was the claimant of the goods and the respondent judgment creditor.

Mr. Searle appeared for the appellant.

Mr. Graham for the respondent.

In the interpleader suit the claimant,

Johan F. Heydenryck, stated: I reside at Jansenville. I am a creditor of J. J. van de Venter to the amount of £133 7s. 6d., for which I hold two promissory notes; the one is due on the 31st August, and the other is due on the 31st December, 1896.

I know the document produced marked A, it is a deed signed by Van de Venter, in which he pledges to me a cart, six horses, wagon, harness, thirteen oxen and one cow. All these have been delivered to me. They were delivered to me on 30th April last. Mr. Mostert was present when these things were delivered. After delivery I gave all these things back to Van de Venter to carry on his work so as to pay off the debt. I have received no money from him since. Since the writ of execution was issued I have taken the wagon, nine oxen, and one cow into my possession. I did not take the other

things because the messenger had attached them. Up to the present time Van de Venter is still owing me the money.

The horses, &c., seized by the messenger were not in my possession when seized. Since these things were delivered to me on the 30th April and given back by me to Van de Venter, they have never been again delivered to me. These things were not in my yard when seized. I did not know that Van de Venter was being pressed when he signed the deed marked A. He never told me that he was in difficulties. I had this deed drawn up to secure myself.

ANNEXURE A.

I, Johannes Jacobus van de Venter, residing at Jansenville, do hereby acknowledge myself to be justly and lawfully indebted to and on behalf of Johan Frederick Heydenryck, of Jansenville, in the sum of £133 7s. 6d. . . . . and for the security of the due payment thereof, I do hereby specially pledge certain live-stock and chattels (my own *bona-fide* property) as follows . . . . . all of which have been duly handed and delivered to the said Johan Frederick Heydenryck, who shall be at liberty in the event of the first-named promissory note for £66 7s. 6d. due 31st August, 1896, not being paid when due to sell and dispose of the said wagon, oxen, cow, cart, horses, and harness.

The Resident Magistrate declared the property to be liable to execution.

The following were the Resident Magistrate's reasons:

A warrant of execution having been issued in the case of P J. Fourie v. J. J. van de Venter and Aletta W. van de Venter, the Messenger of the Court attached certain cart, six horses and two oxen, which said cart, &c., J. F. Heydenryck claimed as his property, as having been pledged to him by Van de Venter on 30th April, 1896, as per agreement attached to record.

Interpleader summons was issued, and from the evidence led it was shown that the cart and horses were pledged to Heydenryck by Van de Venter and delivered in Heydenryck's yard; but on that same day Heydenryck redelivered the cart and horses to Van de Venter to carry on the business, and consequently lost his right to that property as against other creditors of Van de Venter's, as to make an agreement of pledge valid, not only delivery of the property pledged is required but a retention of possession by the pledgee or creditor.

In giving judgment I was guided by the two decided cases: (1) *Van de Venter* v. *Moss and Wett* (Buchanan, E.D.C. Reports, Vol. IV., page 222), and (2) *Kearns* v. *Cole* (Juta, Vol. 10, page 63).

Mr. Searle, for the appellant, relied on the cases of *Kearns* v. *Cole* (10 Juta, 63) and *Payne* v. *Yates* (9 Juta, 497).

Mr. Graham was not called upon.

The Chief Justice said: There is no principle more firmly established in our law than that a pledgee only retains his real right in respect of the thing pledged so long as he remains in possession of it. His possession may be actual or constructive. Cases have arisen in this Court where the physical possession by another person, not being the pledgor, has been held to be possession by the pledgee, but, as was remarked in *Payn* v. *Yates* (9 Juta, 497), there is no case in which the continued detention of the thing by the pledgor has been held equivalent to possession by the pledgee. Such a case has, however, since arisen in Scotland, where the general rule also appears to be that "in a pledge of movables the creditor who quits the possession of the subject loses the real right he had in respect of it." (Erskine's Inst., 3, 1, 33). Certain goods having been pledged by the owner to his creditor under a contract giving the creditor "immediate and absolute power of sale," the creditor employed the owner as his broker to sell the goods on his behalf. The goods having been duly sold, a certain other creditor arrested the purchase price due by the purchasers to the debtor, and the question arose in the Court of Session which of the creditors was entitled to the benefit of the proceeds of the sale. The Court of Session decided in favour of the arresting creditor, but on appeal the House of Lords reversed the decision: *North Western Bank* v. *Poynter* (L.R.A.C. 1895, p. 56). The Lord Chancellor, after quoting from *Bell's Commentaries* and from *Voet* (2, 1, 12), adds: "Where it is a pledge, as here, with a power of sale, I cannot think that anything I have yet read warrants the assertion that the delivery to the pledgor, who is a broker, for the purposes of sale would destroy all the rights of the pledgee." There was a conjunction of circumstances which led to the irresistible conclusion that the pledgor's retention of the goods was and was intended to be, a possession on behalf of the pledgee and of him only. In the present case the pledgor not only obtained possession of the cart and horses but used them in his own business as post contractor. The Magistrate therefore properly held that the appellant having parted with the possession of the cart and horses is not entitled to claim them as against the judgment creditor at whose suit they have been attached in execution, and the appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. J. C. Berrangé & son; Respondent's Attorneys, Messrs. Van Zyl, Buissinné & Leonard.]

FULSS V. MOLENTZE. { 1896. Nov. 3rd.

Master and servant—Injury in course of employment—Privity of contract—Requests.

A surgeon who has attended a servant for an injury at the servant's request and not at the request, express or implied, of the master, is not entitled to recover his fees from the master, although the servant may have sustained the injury in the course of his employment.

The surgeon may recover the fees from the servant even although he may at first have debited the master in his books upon the servant's erroneous statement that his master would pay for the necessary attendance.

This was an appeal from the decision of the Resident Magistrate of Barkly East in a case in which the appellant was plaintiff, and sued for £1 10s. 6d. medical charges The judgment was absolution from the instance.

Mr. Benjamin appeared for the appellant; Respondent in default.

In the proceedings before the Resident Magistrate the plaintiff,

Frederick Fulss stated: I am a medical practitioner and reside in Barkly East. I know defendant; the account annexed to summons is correct, and is for the services I rendered and medicines supplied to defendant. Defendant called on me on November 3rd, 1895. He had a wound in the palm of his hand. He was alone. I attended the wound. Defendant asked me to attend to him. He said Mr. Vallentine would pay for it I made some of the entries to defendant and two to Vallentine. The first two I made to Vallentine. I made these entries to Vallentine because defendant was in his service. Defendant said Vallentine would pay. Vallentine never agreed to pay the debt. I asked him and sent him an account. Mr. Vallentine refused to pay, saying he had not sent defendant. Defendant received the benefit of the treatment. I know that defendant received the wound in Vallentine's service, and from the nature of the wound it was absolutely necessary he should receive attention. Defendant told me he was corking bottles for Vallentine and one broke in his hand. I never freed defendant from the responsibility of his debt or said that I would get it from Vallentine. While I was attending defendant the first day, Mr. Sinstrom, the clerk of Vallentine's, asked if defendant was there. He did not say more than ask if defendant was there, and then went away. I have demanded the amount from defendant, and he still owes it. I think it was in the morning defendant came to me. He was in a feeble condition from the loss of blood. I was busy attending to the wound when Sinstrom came in. He said, "Is Mollentze here?" He did not say the firm would settle the amount. I never asked Sinstrom about the accident. Defendant described the accident. Sinstrom did not come in but stood at the door. I left my surgery when he knocked. I don't remember if Sinstrom requested me to dress defendant's hand. I did not see Sinstrom for months after 30th November, 1895. I commenced to debit defendant from 4th December, 1895. I cannot explain why I debited defendant instead of Vallentine & Co. The debits to Vallentine & Co. were on account of Mollentze's hand. I rendered my account to Vallentine & Co. because defendant said Vallentine & Co. would pay. In January and February, 1896, I rendered my account to Vallentine & Co. I never rendered defendant an account. I saw him personally after Vallentine refused to pay the account. Vallentine denied liability and alleged he never sent defendant to me for treatment. He did not admit having sent defendant to any doctor. I debited Mollentze, but from what he told me I thought Vallentine would pay. A good long time ago I told my attorney to take steps. After January last I saw Mr. Sinstrom and asked me if he had said Vallentine had sent defendant to me. He said he had not said so. After Vallentine declined to pay the account I made no further claim on him. If Sinstrom had said Vallentine would pay the account, I would have come down on him. I charged Vallentine from what defendant had said.

The judgment given was absolution from the instance with costs

The Magistrate gave as his reasons for judgment:

"Defendant in this case was in employment of Vallentine & Co., and actually performing work for them when he received the accident. Plaintiff was aware of this and in his day book charged 'Vallentine & Co..' in whose employ defendant was, but later on, five days later, finding Vallentine refused to pay he charged defendant, *vide* xtract of day book with proceedings. Sinstrom is a clerk in the employment of Vallentine & Co. and it was he

who called at plaintiff's to see if defendant was being attended to. From the evidence of plaintiff it was clear to me that the wrong party had been sued and I consider Vallentine & Co. should have been sued and not Mollentze, hence my judgment 'absolution from the instance with costs.' '

Mr. Benjamin, for the appellant, urged that the mere fact that defendant was in the position of a servant to Vallentine & Co. did not make the latter liable. The injury was received indeed in the course of the employment by Vallentine, but that was a ground for action and for damages by the servant against the latter. The defendant was in the position of an unauthorised agent: see *Evans* (Principal and Agent, p. 353). The defendant might have believed *bona fide* that he was entitled to his treatment being paid for by Vallentine and indeed he told the doctor that Vallentine had sent him; but when he discovered that this was a mistake the respondent became liable undoubtedly, and was the proper person to be sued.

The Chief Justice said: In this case the Magistrate quite mistook the law. He held that where a servant has sustained an injury in the course of his employment a surgeon who has attended the servant for such injury at the request of the servant and not of the master is entitled to recover his fees from the master. In the absence of such a request, express or implied by the master, there is no privity of contract between the surgeon and the master. It may well be that the defendant in the present case is entitled to recover from his masters any fees which he may have to pay to the plaintiff, but the plaintiff can only look to the defendant for payment. The fact that the plaintiff at first debited the masters, Vallentine & Co., with the fees does not prevent him from suing the defendant, after discovering that they had never authorised the defendant to make any request or promise on their behalf. The Magistrate granted absolution from the instance without there being proof that Vallentine & Co. had given such an authority to the plaintiff.

The judgment must be reversed with costs, and the case must be remitted to be tried on its merits.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

REHABILITATION. } 1896. Nov. 5th.

Mr. Buchanan applied for the rehabilitation of Richard Henry Bartlett. It appeared that the insolvent absconded, and filed no schedules, and the application was postponed for further information with regard to the absconding.

GENERAL MOTIONS.

IN THE MATTER OF THE PAARL BANK.

Mr. Schreiner, Q.C., applied for an order dissolving the said bank, and authorising the official liquidators to cause all books, accounts, and documents thereof to be destroyed, the liquidation having been concluded.

Order granted.

IN THE MATTER OF THE WESTERN PROVINCE BANK.

Mr. Innes, Q.C., presented the report of the official liquidators. The report was ordered to be published in the "Dagblad" and "Government Gazette."

The usual order was made.

IN THE MATTER OF THE MINOR CHARLES P. TIRAN.

Mr. Tredgold moved for the appointment of some person to assist the said minor in the execution of articles of apprenticeship to an attorney in Cape Town, and for an order authorising the Master of the Supreme Court to pay out of money coming to the minor out of his parents' estate his expenses of maintenance for two years.

Order granted.

VILJOEN V. DE VILLIERS.

Application for an order removing respondent from his trust as one of the executors of the estate of the late Hester J. Viljoen by reason of his failure to attend to the same, and requiring him to deliver to applicant all documents relating thereto, and account for moneys received.

Mr. Buchanan appeared for the applicant.

Mr. Searle, Q.C., appeared for the respondent

By consent, the Court ordered the respondent to pay the costs of the application, the costs incurred by the Master in the proceedings against both trustees, and ordered the respondent to file an account of the joint administration on or before December 31 next.

THE PETITION OF ADAM MARNEWICKE.

Mr. Graham applied for leave to sue *in forma pauperis* in an action against the South African Mutual Life Assurance Society for the recovery of the amount of a policy of insurance effected on the life of petitioner's wife, which became due upon her death.

Order granted.

SHAW V. MOORHEAD. { 1896. Nov. 5th. „ 12th. „ 19th.

Partnership—Assets and debts—Name and credit—Personal use—Dissolution—Receiver—Interdict—Rule *nisi*—Other relief.

S. *and* M. *were partners. The firm was dissolved on* S. *leaving the Colony and a new firm was made, in which* S. *was sleeping partner, and* M. *the working partner.*

S. *subsequently gave notice of motion for an order to restrain* M. *from using the assets and credit of the new firm for his own personal purposes, as he clearly had been doing according to an account framed by himself.* M. *thereupon endeavoured to collect certain debts of the old firm not yet matured or owing.*

The Court granted a rule nisi, *to operate as an interdict, against* M.'s *collecting the debts of the old firm, and on the return day (the day of hearing the original motion) made the rule absolute, and under the prayer for "other relief" contained in the original motion granted a rule* nisi *calling on respondent to show cause why the partnership be not dissolved and a receiver appointed.*

This rule was also subsequently made absolute.

This was an application by Dr. Shaw upon motion calling upon the respondent, Dr. Moorhead, to show cause, if any, why an interdict should not be granted restraining him (*a*) from using the assets and funds of the firm of Shaw & Moorhead (new firm), of Burghersdorp (of which firm the abovenamed applicant and the respondent were the partners), for respondent's own personal purposes otherwise than in the terms of the deed of partnership of the said firm, (*b*) and from using the name and credit of the said firm for respondent's personal purposes; pending legal proceedings to be taken against the said firm for the recovery of such moneys as might be due to applicant by the said firm. . . . In support of this application the following affidavit was filed by Mr. Johannes Cornelius van den Heever:—

1. I am an attorney of this Honourable Court, and practice at Burghersdorp, in the district of Albert.

2. I am the duly authorised attorney and agent in this colony of the abovenamed applicant, and I attach hereto the general power of attorney appointing me as such.

3. The abovenamed applicant and respondent carry on business in partnership at Burghersdorp as doctors of medicine, under the style or firm of Shaw & Moorhead (new firm). The applicant is the sleeping partner and resides at Johannesburg, in the South African Republic, and the respondent is the working partner, and resides at Burghersdorp and carries on the practice of the partnership in the district of Albert.

4. I annex hereto the deed of partnership of the parties.

5. The applicant is the sole remaining partner of the old firm of Shaw & Moorhead referred to in paragraph 1 of the said deed of partnership, and he is the party entitled to the sums of £205 11s. 6d. and £843, mentioned in paragraph 5 of the said deed of partnership.

6. That on account of the two sums mentioned in the immediately preceding paragraph and of the £300 mentioned in paragraph 6 of the said deed of partnership, the respondent on behalf of the new firm of Shaw & Moorhead has only paid to the applicant certain moneys, amounting in all to about £100, during the period commencing on the 1st day of May, 1896, and ending on the 30th of September, 1896.

7. That as the attorney of the applicant I have been endeavouring in every possible manner for some months past to get the respondent on behalf of his firm to make payment on account of the firm's indebtedness to the applicant, but without success, for only about £100 has been paid by respondent's firm as aforesaid.

8. That the said respondent in his private capacity is indebted to sundry creditors in large sums, which he is entirely unable to meet, and he has during the twelve months ending on the

30th day of April, 1896, according to his own showing, illegally and wrongfully and without the consent of the applicant used £246 3s. 3d. of the funds of the partnership to satisfy his private creditors, and in corroboration of this statement I annex hereto a copy of the balance-sheet of the new firm of Shaw & Moorhead, as rendered by the respondent to the applicant.

9. That I have inspected the books of the partnership as kept by the respondent, and I find that according to his own showing, that during the period commencing on the 1st day of May, 1896, and ending the 30th day of September, 1896, the respondent has received in cash £691 17s. 5d., and that he has debited the firm with £490 0s. 5d. as disbursements, which should leave a sum of £201 17s. in cash to the credit of the partnership, but which last mentioned sum the respondent has illegally and wrongfully and without the consent of the applicant used for the purpose of paying his private creditors, and I would further point out to this Honourable Court that a number of the items included in the debit of £490 0s. 5d. against the said firm, are moneys which are payable by the respondent in his private capacity, and are thus wrongfully debited to the firm. For instance, I find, *inter alia*, that in the month of May, 1896, the firm is debited with £26 15s. 8d. for the respondent's private market accounts, and in July, 1896, the firm is also debited with £13 10s. for rent due by the respondent for his private dwelling-house; thus the respondent has already, according to his own showing, made use of some £488 6s. 4d. out of the funds of the partnership for his private purposes.

10. As the representative of the applicant I have in every way endeavoured to meet the respondent, and have attempted to obtain from him as representing the said firm cession of a certain number of the outstanding accounts of the partnership in terms of paragraph 9 of the said deed of partnership on account of the moneys due to the applicant, but the respondent has done his utmost to thwart me in every way, and has refused to cede to applicant any of such accounts.

11. That I have inspected the books of the partnership as kept by the respondent, but they have been kept so indifferently, and the respondent has mixed up his private affairs with the affairs of the partnership in such a manner that it is difficult to find out the true position of the partnership.

12. That the respondent is so embarrassed in his private affairs that I fear unless he is interdicted from using the funds of the said partnership, that he will still continue to make use of the said funds for his private purposes, and that he will pledge the name and credit of the said partnership.

13. I would further point out to this Honourable Court that the said respondent ceded certain accounts of the said partnership to the applicant some short time back, in terms of paragraph 9 of the said deed of partnership, by formal deed of cession, but that notwithstanding this cession he has wrongfully collected from the Cape Government Railways one of the said accounts amounting to £5 9s., and has appropriated this money for his own private purposes.

After the notice of motion and affidavit had been lodged with the Registrar of the Court, Dr. Shaw made an urgent application on the 5th November for a rule *nisi*, to operate meanwhile as an interdict, calling upon the respondent to show cause on the 12th day of November instant, why he should not be restrained from collecting any debts owing to the old firm of Shaw & Moorhead, and from using any of the assets of the old or new firm for his own purposes pending the further order of the Court.

In support of this the following affidavit was made by Mr. Johannes Cornelius van den Heever, of Burghersdorp:

1. That deponent is the general agent and attorney in this colony of the above-mentioned applicant.

2. That deponent's firm caused a notice of motion to be served on the abovenamed respondent personally on the 29th day of October, 1896, calling upon him to show cause why an interdict should not be granted by this Honourable Court restraining him, *inter alia* from using the funds and assets of the new firm of Shaw & Moorhead, of Burghersdorp, for his own persoral purposes, and deponent craves leave to refer this Honourable Court to the notice of motion and the affidavit of deponent, with annexures, filed with the Registrar of this Honourable Court at Cape Town.

3 That notice of motion as aforesaid has been given for the 12th day of November, 1896, but since the service of the notice of motion the respondent has made special efforts to collect the outstanding accounts of the partnershi , and deponent verily believes that the respondent is using the moneys of the said partnership so collected for his private purposes, notwithstanding that deponent caused a letter of warning to be written to him, a copy of which is hereto attached, and to which the respondent has not deemed it necessary to reply.

4. In corroboration of the immediately preceding paragraph deponent would point out to this Honourable Court that the respondent endeavoured to collect from one Meindert Pos, of Burghersdorp, after deponent served the said notice of motion on him the sum of about £5 15s. 6d., being an amount due to the said firm of Shaw & Moorhead, and payable only in the month of January, 1879.

5. That part of the furniture of the respondent was attached on or about the 29th day of October last by the Messenger of the Court at Burghersdorp for debt.

6. That the attorney of the respondent has informed deponent that the respondent has caused a notice of his intention to surrender his private estate to be sent to Cape Town for insertion in the "Government Gazette."

7. That deponent greatly fears that if respondent be not at once interdicted from collecting the outstanding accounts of the said firm, and using same for his private purposes, the applicant will be a great sufferer and loser, and deponent fears that the respondent will be able to collect a fair amount of the outstanding accounts between this date and the 12th day of November, 1896, unless he be interdicted from so doing.

Mr. Schreiner, Q.C., applied.

The Court granted a rule returnable on the 12th November, service to be effected under Act 41 of 1882.

Postea (12th November).

Mr. Schreiner, Q.C., moved to make absolute the rule *nisi* interdicting the respondent from collecting any debts owing to the former partnership between him and the applicant, and from using for his own purpose any assets thereof, or of the present professional partnership, pending the further order of this Court.

The Court made the rule absolute with costs, including costs of the first motion.

Mr. Schreiner then applied upon the original notice of motion and asked that the rule be granted, or that (under the prayer for "other relief") the partnership might be declared dissolved, and a receiver appointed by the Court. He cited **Capora* v. *Marriott* (1 Sheil, 304). The Court referred him to *Putnam* v. *Redfield* (Buch. 1874, p. 79), for the appointment of a receiver, so that both sides might be protected.

The Court made an order calling upon the respondent to show cause on November 19 why the partnership should not be dissolved and a receiver appointed.

* 9 Juta, 12.

Postea (19th November).

Mr. Schreiner, Q.C., applied to make absolute the rule *nisi* dissolving the partnership between the parties as medical practitioners, and for the appointment of Joseph Jacobsohn, of Burghersdorp, as receiver to realise the assets and liquidate the affairs of the firm of Shaw & Moorhead.

Granted with costs.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn.]

IN THE ESTATE OF THE LATE ELIZABETH M. C. DE VILLIERS. { 1896. Nov. 5th. „ 23rd.

Will—*Fidei-commissum* — Testator's intention—Satisfaction of condition—Death—Dissolution of marriage—Benefit of fiduciaries — Sale of fidei-commissary property.

D. *died, leaving a will under which* W. *was instituted sole heir, subject to a* fidei-commissum *in favour first of* W.'s *descendants, and second of the blood relations of the testatrix. The will further provided, however, that should* W. *survive her husband she should have the inheritance. Subsequently* D. *obtained a divorce from her then husband; and applied to the Court for leave to deal absolutely with the estate, the marriage having been terminated by the divorce as much as it could have been by death, and the intention of the testatrix (to protect* W. *from her husband) having thus been fully met. Bondholders were threatening to obtain judgment and funds were required.*

The Court *authorised the sale of the* fidei-commissary *property, the money to be paid into the Guardians' Fund for the benefit of the trust.*

This was an application upon the petition of the Rev. William Petrus de Villiers, of Carnarvon, which set forth:

1. That your petitioner's sister, the late Isabella Maria Catharina de Villiers, died at the Paarl in or about the year 1889, having previously been divorced from her husband, one Warden, and that your petitioner was appointed executor testamentary of her estate.

2. That the only remaining asset in the estate consists of an erf with the buildings thereon, situate at the Paarl and valued for

Divisional Council purposes at the sum of seven hundred and fifty pounds (£750) sterling.

3. That your petitioner on or about the 12th day of October, 1892, obtained an order from this Honourable Court to raise a loan on mortgage of said property to satisfy the debts of the estate, the balance due on said mortgage bond being at the present time £282 11s. 1d., with interest from about November, 1894, together with certain five assurance premiums.

4. That the only issue of the deceased is a daughter, Elizabeth Maria Warden, at that time married to one Ockert Tobias de Villiers, as petitioner believes, in community of property.

5. That by her last will the deceased appointed her said daughter, married as aforesaid, as her sole heir burthening the inheritance with a *fidei-commissum* to the following effect:

"She shall during her lifetime be entitled to the usufruct or yearly interest thereof, which shall be paid to her personally on her own receipt without control or assistance of her husband, and on her death the capital itself shall as free and unburthened property pass over and devolve on her children, and in the event of the predecease of one or more of them then on their lawful descendants by representation, and failing such on my (the testatrix's) blood-relations according to the law of succession of this colony. In case however her husband, the said Ockert Tobias de Villiers, should die before my said daughter and their joint estate be found to be solvent, my executor shall be authorised and he is hereby empowered, after satisfying himself thereof, to pay out the said inheritance to her, and thereupon she shall have the right to dispose thereof by will or otherwise at her discretion, anything to the contrary hereinbefore notwithstanding."

6. That the said Elizabeth Maria, has since the death of her said mother enjoyed the usufruct of the landed property aforesaid, but that she has failed to provide for the interest due on the bond, and that the bondholder is threatening to take legal proceedings for the recovery thereof, which would probably involve the sale in execution of said property.

7. That the said Ockert Tobias de Villiers is still alive, but that the marriage subsisting between him and the said Elizabeth Maria Warden has been dissolved by order of the High Court of the South African Republic, dated 1st day of October, 1895; that there is no issue of the said marriage, and that the said Elizabeth Maria Warden has since, to wit on the 17th October, 1895, contracted another marriage with one Tom Henry Morgan, as petitioner believes, in community of property.

8. That the said Elizabeth Maria has, on the grounds of the dissolution of her marriage with her first husband, the said Ockert Tobias de Villiers, applied to your petitioner to pay to her the capital of her said inheritance out of her mother's estate, but that in view of the terms of the will your petitioner does not feel justified in so doing without the sanction of Court.

Wherefore your petitioner prays that it may please your lordships to grant an order authorising him in his said capacity to pass transfer to the said Elizabeth Maria Morgan (born Warden), of the said landed property on her satisfying the amount due by the estate, or to sell the said property and to pay her the balance proceeds, or to grant such further or other relief as to your lordships may seem meet.

Mr. Schreiner, Q.C., appeared for the petitioner, and argued that marriage is as much dissolved by divorce as by death. The only persons who in the last resort (if the fiduciary when she died had no children) would have any interest under the will are the blood-relations. They consent. The husband lately divorced could in no case have any interest. The first persons entitled are the (at present unborn) issue: if there should be any the course proposed would be no disadvantage to the issue. It would in fact benefit them. The property might now be sold compulsorily by the mortgagee, unless the Court gives this order. The actual *wording* of the will clearly makes the right to sell the property dependent on death, but the *intention* was clearly to protect the daughter of testatrix against the husband till after his death. The Transvaal Court made no order as to forfeiture by the husband of his benefits under the marriage.

The Court authorised the executor to sell the land as prayed, and at his discretion either to pay the proceeds into the Guardians' Fund, or invest the same on behalf of the *fidei-commissary* trust.

Postea (23rd November).

The Chief Justice said: With reference to the application of the Rev. Mr. De Villiers to this Court on November 5 last, a question has arisen as to the construction of the order. There seems to have been a bond for £300 upon the property, which it is proposed to sell, and the question is whether the executor will be authorised to pay off the bond. Of course he will be entitled to do so. A further question is whether, if he buys other land with the proceeds of the sale, he can burden that land to the

extent of £300. In our opinion he would be justified in doing so, but it is no part of the application, and ought not to be added to the order.

[Applicant's Attorney, A. J. van Reenen.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

REGINA V. JAN AARON. { 1896. Nov. 6th.

Mr. Justice Maasdorp said: As judge of the week the case of the Queen v. Jan Aaron came before me. It was from the Court of the Special Justice of the Peace at Laingsburg. The accused was charged with theft of honey from the hives of Stephanus Jacobs. He pleaded not guilty, but was found guilty, and fined £1, or fifteen days' imprisonment. There appears to be no evidence that any honey was taken from the hives of Jacobs. The only evidence against the accused is that some honey was found smeared about his clothes. There was no direct evidence that the honey was taken from Jacobs's hives. The conviction must therefore be quashed.

ORSMOND V. FITZGERALD. { 1896. Nov. 6th.

Damages—Costs of previous application—Joint trustees — Misrepresentation — Alleged agency—Rule 329.

O. *and* F. *were appointed joint provisional trustees in the insolvent estate of* M.

In connection with the administration of the estate, it became necessary to institute legal proceedings, and O. *and* F. *instructed a firm of attorneys to represent them in the said proceedings.*

The taxed costs of the attorneys amounted to £62 5s. 7d., which amount O. *paid to* F. *on the latter's representation that he was the attorneys' duly authorised agent to receive the same.*

F., *on receipt of the money, signed vouchers, purporting to do so as the attorneys' agent, but he failed to pay the money over.*

Subsequently F. *was removed from his trust, and thereafter* O. *tendered an account of his administration, supported amongst other vouchers by those which* F. *had signed on receipt of the £62 5s. 7d.*

The Master refused to accept the account until vouchers had been produced from the attorneys showing that their account had been paid, or until a power from them was exhibited authorising F. *to sign vouchers on their behalf.*

The Master's requirements not having been complied with, he issued a summons against O. *calling upon him to file an account supported by vouchers.*

O. *defended the proceedings brought against him by the Master.* The Master v. Mandy's Trustee (6 Sheil, 258), *and in these proceedings* F. *filed an affidavit in which he alleged, in effect, that he was the attorneys' agent to receive the £62 5s. 7d., but the attorneys denied his alleged agency.*

The Court gave judgment against O. *and ordered him to pay the costs of the proceedings* de bonis propriis.

Thereafter O. *paid the attorneys their bill of costs, and on receipt of vouchers for the same the Master accepted the account and it was duly confirmed.*

Thereafter O. *sued* F. *for the £62 5s. 7d., the amount of the attorneys' bill of costs, and also for £28 6s. 2d. as damages, being the costs which he had incurred in defending the proceedings brought against him by the Master.*

Held, *that* O. *was entitled to succeed on both claims.*

This was an action to recover the sum of £62 5s. 7d. and £28 6s. 2d. as and for damages.

The declaration alleged:

1. The plaintiff to this suit, Arthur C. Orsmond, is an agent, carrying on business at Lady Grey, in the division of Aliwal North the defendant to this suit, Patrick Michael Fitzgerald, is an attorney of this Honourable Court, practising at Lady Grey aforesaid.

2. The plaintiff and the defendant were appointed provisioanl trustees in the insolvent

estate of one George Edward Mandy, by an order of this Honourable Court bearing date the 2nd day of May, 1895, with power to administer and finally liquidate the said estate.

3. In connection with the administration of the aforesaid insolvent estate it became necessary to institute certain legal proceedings in this Honourable Court, and the plaintiff and the defendant in their capacity as trustees duly authorised Messrs. Fairbridge, Arderne & Lawton to represent them in such proceedings. The taxed costs of Messrs. Fairbridge, Arderne & Lawton in the said proceedings and costs of other professional services rendered in connection with the aforesaid estate amounted to £62 5s. 7d.

4. In or about the 5th day of June, 1896, the defendant wrongfully, unlawfully, and falsely represented to the plaintiff that he (the defendant), was the duly authorised agent of Messrs. Fairbridge, Arderne & Lawton, to receive the said sum of £62 5s. 7d. on their account, and in consequence of such false representation the plaintiff paid to the defendant out of the funds belonging to the said insolvent estate for and on account of Messrs. Fairbridge, Arderne & Lawton the said sum of £62 5s. 7d.

5. Upon receipt of the said sum of £62 5s. 7d. the defendant signed vouchers for the same, purporting to do so as the duly authorised agent of Messrs. Fairbridge, Arderne & Lawton, whereas in fact, he had no authority to receive the said moneys for and on behalf of Messrs. Fairbridge, Arderne & Lawton, nor to sign vouchers on behalf of that firm.

6. In the month of August, 1895, the defendant was removed from his trust by order of this Honourable Court.

7. In or about the month of July, 1896, the plaintiff lodged with the Master of the Supreme Court the account and plan of distribution in the aforesaid insolvent estate. Amongst the vouchers filed by the plaintiff in support of the said account were those given to him by the defendant and referred to in paragraph 5 of this declaration. The Master refused to accept the said account on the grounds that the vouchers for the payment of the aforesaid sum of £62 5s. 7d., the taxed costs of Messrs. Fairbridge, Arderne & Lawton hereinbefore referred to, did not bear the signature of that firm, and were not supported by a power of attorney executed by Messrs. Fairbridge, Arderne & Lawton authorising the defendant to sign the aforesaid vouchers on their behalf.

8. Thereafter on or about the 1st day of August, 1896, the Master of the Supreme Court instituted proceedings in this Honourable Court to compel the plaintiff in accordance with law to file a full and true account in the said insolvent estate, supported by vouchers signed by Messrs. Fairbridge, Arderne & Lawton, for the aforesaid sum of £62 5s. 7d., and judgment was given against the plaintiff and he was ordered to pay *de bonis propriis* the costs incurred by the Master in the said proceedings.

9. The defendant had due notice that the proceedings referred to in the last paragraph were being instituted against the plaintiff, and he filed an affidavit in the said proceedings wherein he alleged that he was the duly authorised agent of Messrs. Fairbridge, Arderne & Lawton, to receive the said sum of £62 5s. 7d., although the said firm repudiated his alleged agency.

10. Thereafter the plaintiff duly paid to Messrs. Fairbridge, Arderne & Lawton the sum of £62 5s. 7d., being the amount of their taxed costs as aforesaid, and obtained vouchers for the same, which were duly lodged with the Master, who then accepted the account in the said insolvent estate, and thereafter it was duly confirmed.

The plaintiff also paid the taxed costs incurred by the Master in the proceedings referred to in paragraph 8 hereof, and also the costs incurred by himself in the said proceedings, amounting in all to the sum of £50 or thereabouts.

11. By reason of the premises the plaintiff is entitled to demand from the defendant payment of the aforesaid sum of £62 5s. 7d., together with £50 damages, being the costs incurred by him in defending the proceedings referred to in paragraph 8 hereof. The plaintiff would not have defended the aforesaid proceedings if it had not been for the defendant's false representations as aforesaid.

Wherefore the plaintiff claims:

(*a*) Judgment for the sum of £62 5s. 7d.;

(*b*) £50 as and for damages as aforesaid;

(*c*) Such alternative or general relief as to this Honourable Court may seem meet;

(*d*) Costs of suit.

Mr. Sheil (Acting Attorney-General) for the plaintiff; defendant in default.

Plaintiff applied for judgment for £62 5s. 7d. under rule 319.

Mr. H. T. Standen, of the firm of Sauer & Standen said his firm had acted for the plaintiff in the action against him by the Master. The costs which plaintiff was ordered to pay amounted to £28 6s. 2d.

The Chief Justice: Why was the motion defended?

Witness: Orsmond took Fitzgerald's assurance that he was Fairbridge's agent, and authorised to collect the money.

The Chief Justice: But *prima facie* he was not; and he held no power of attorney.

Witness: I filed an affidavit of the defendant's stating that he was the agent.

Judgment was given for the amounts claimed, with costs.

[Plaintiff's Attorneys, Messrs. Sauer and Standen.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

LIEBENBERG v. STEWART. { 1896. Nov. 9th.

Illegal impounding — Trespass — *Servitus aquæhaustus*—Following up water—Meaning of "At" — Construction — Future rights.

S. *leased a portion of the farm* C. *from* R. *who subsequently sold* C. *to* L. *In terms of the lease* S. *had the right to water his stock "at the well" on a portion of* C., *which was not leased to him; together with a right of passage for his sheep to and from the water.* S. *continued to exercise this right till* L. *seized a large quantity of his stock and impounded them; and after detaining them for some days, released them short in number as* S. *alleged.* S. *brought an action for damages for illegal impounding.*

The Resident Magistrate found that the defendant had commenced to constructed a furrow to lead water from the well, but had abandoned it on plaintiff's protest; that the water in the furrow was from the well; and that plaintiff was entitled to the use of the water at any part of the furrow. He gave judgment for plaintiff with costs.

On appeal, the Court held *that as the spot where* S. *had watered his stock was about 300 yards from the well he had gone further than a strict construction of his right to water stock "at the well" would allow, and altered the Resident Magistrate's judgment to one of absolution from the instance.*

This was an appeal from the decision of the Resident Magistrate of Britstown in an action (in which the present appellant was the defendant) brought by the respondent to recover the sum of £10 damages for illegal impounding. The summons set forth:

1. That plaintiff is the lessee of a certain portion of the farm Commissie Kraal, in the district of Britstown, by virtue of a certain lease entered into between him and one Reinier Adrian Swiegers, the then owner of said farm, on the 16th day of September, 1894.

2. That defendant is one of the present co-owners of the said farm Commissie Kraal, he and his two brothers, Hendrik Liebenberg and Petrus Liebenberg, having bought same from the said R. A. Swiegers, together with the rights and liabilities attached to the above-mentioned lease and that the said farm Commissie Kraal was transferred to the defendant and his aforesaid brothers, before the occurrences hereinafter to be named took place.

3. That by virtue of clause 7 of the above-mentioned contract of lease, plaintiff has a right to water his sheep at a certain well or fountain, situated on the portion of Commissie Kraal not included in the said lease, but at present occupied by the defendant, and has also a right of passage over that portion of ground for his sheep to and from the water.

4. That on or about the 28th August, 1896, the plaintiff, in exercise of the right described in section 3 hereof, caused his sheep to be brought to the water, but that defendant then and there unlawfully and wrongfully took 891 sheep and 27 goats or thereabout, the property or in the lawful possession of plaintiff, and impounded them the next day in the pound at Diedrichsput in this district, from which plaintiff released on the 31st August, 1896, 884 sheep and 27 goats under protest.

The plaintiff, Stewart, alleged he had suffered £10 damages, which defendant had refused to pay.

Defendant pleaded to this summons:

1. Defendant admits paragraphs 1 and 2 of the summons.

2. With regard to paragraph 3. defendant admits that plaintiff has the right to water his stock at a certain well on the homestead.

3. With reference to paragraph 4, defendant denies that plaintiff had the right to water his stock at the place where they were taken when impounded.

He denied that any damage had been sustained and pleaded the general issue.

The lease contained the following clause, which was relied on by the plaintiff, Stewart:

"Verder zal de huurder de recht hebben van passage voor zijn vee en gebruik van de water bij de put op de woonstede en gebruik van de water uit de put om de tuin te benatten, voor welk doelein 'e de huurder de windpomp op de put te gebruiken."

The Resident Magistrate found for plaintiff, and gave judgment for the amount claimed with costs, giving as his reasons:

Judgment in this case was deferred on the 15th inst., as I wished to go carefully through the evidence, and also if possible to visit the farm Commissie Kraal and see the furrow where plaintiff's sheep were supposed to have trespassed, but as I have been informed that this furrow has been tampered with since that date, I considered it advisable not to visit the farm, but give my judgment simply on the evidence taken before me. After going carefully through the evidence, I have come to the conclusion that the whole question in this case is for me to decide whether the plaintiff's sheep were trespassing at the furrow or not, and if defendant had a right to impound them. Under the seventh clause of the lease entered into between plaintiff and one Swiegers (the former owner of the farm), dated the 16th September, 1894, it is distinctly stated that plaintiff shall have the right of passage for his stock and use of the water "at the well" on the homestead, and the use of the water out of the well to irrigate the garden, for which purpose the lessee can use the windmill on the well. Now what is the Court to understand by the wording of this clause: "the water at the well" certainly can be taken to mean the water not only at the well but also round the well and flowing from it, for no mention is made in this clause about using the dam or windmill for watering the stock. The windmill I take it must only be used for irrigation purposes, therefore the plaintiff's stock had to drink "at the well." meaning of course any water near the well. Now the question is this: was the water in the *furrow* where plaintiff's sheep drank water *at* the well or not or was it water from quite another source? On this point the evidence of the plaintiff and also Mr. Swiegers was very clear, and I cannot but come to the conclusion that the water in the furrow does flow from the well, especially now since the windmill pump is out of repair. The water it seems overflows into an old furrow, which joins the furrow where the sheep drank. Now what did Mr. Swiegers make this furrow for but to irrigate his lands, and for this purpose to drain off some of the water from the well, but when plaintiff objected he abandoned the furrow; therefore I take it that the furrow as it is now cannot be used for any particular purpose, as there is nothing in evidence to show that defendant made any use of it. I am therefore of opinion that as there was no water in the dam at the well, the plaintiff had to water his stock as best he could at, or near, the well or water flowing from the well which would be in the furrow.

The plaintiff was certainly acting in the terms of his lease and I do not consider defendant had any right to impound his stock for drinking at this furrow. If defendant considered that he had the sole right to the water in the furrow he might have brought an action for damages, but certainly not for trespass. The amount claimed for damages I am of opinion is fair and reasonable, when taking the loss of stock into consideration and also the claim he has under section 72 of Act 15 of 1892, for illegal impounding. I therefore give judgment in favour of the plaintiff for the amount claimed with costs.

Mr. Innes, Q.C., for the appellant: During the trial the point was raised that future rights would be involved. This cannot be upheld in view of *Bertram* v. *Wood* (10 Juta, 177) and *D.C. Riversdale* v. *Pienaar* (3 Juta, 252). This is nominally an action for trespass—but the plaintiff has throughout taken it as an action for a declaration of rights—which should have been brought in this Court. *Prima facie* the stock were trespassing and were rightly impounded. The respondent, however, on whom is the onus, pleads that they were there rightly in view of clause 7 of the lease. That clause gave him the right of passage to the well only. The principal rights were to use the water and the kraal; the ancillary rights were those neeessary for the exercise of these rights. But the only rights the respondent had were actually to the water of the well; though we even concede that he could go to the dam. But he could not follow the water up from the well all over the farm, even if all the water there was from the dam. Clearly defendant could prevent plaintiff from coming to any other but the particular spot for watering. But plaintiff claims the right to go anywhere along the

furrow and take the water there because it comes from the well. But *Voet* (8, 3, 7) on the law of the servitude of *aquæhaustus* says that the owner can also close up the well with a hedge provided he leaves a gate for the owner of the *Res Dominans* to come through. Clearly like the owner of a servitude this lessee must exercise his right subject to all reasonable limitations by the owner of the *Res Serviens*. But it is even by no means clear that the water did all come from the well. There is great conflict of evidence. There must have been a great deal of other water there, as appears from the plan and evidence.

Mr. Searle, Q.C., for the respondent: Though there might have been other water in the furrow yet clearly the bulk was from the well. Both parties clearly saw that the furrow would diminish the supply of water at the well. The servitude cannot mean they must drink at the well or from buckets.

The Chief Justice: There was no furrow when the contract was made. Must not you take the intention of the parties under the circumstances; there being only the well and the dam, was not there a presumption that in the clause in question the parties referred only to what was in existence, viz., the dam and the well?

Mr. Searle: We contend that there should be a reasonable construction of the right— *i.e.*, that we can use our right either at the dam or at the place where water from the dam is. We do not contend that we could follow up wherever it is led. The defendant should have pointed out some convenient spot, otherwise plaintiff could go to any reasonable spot.

The Chief Justice said: In his contract the plaintiff had the right to use the water at the well for his sheep. In other words, he had, in my opinion, a servitude *aquæhaustus*; of drawing the water from the well; and moreover was at liberty, in my opinion, to use a pump for the purpose of drawing water from the well, not only to water his garden, but also to water his sheep. The language in the original is somewhat ungrammatical, but it is reasonably clear. Literally translated it is as follows: "Further, he also shall have the right of passage for his cattle and use of the water at the well on the homestead to water his garden and cattle, for which purpose he also to use the windmill at the well." Apparently some words are omitted. I think the words "Zal het recht hebben" (shall have the right) to use the windmill on the well. Under this contract surely the plaintiff would be entitled to utilise the pump not only for the purpose of getting the water for his garden, but also to fill the dam in order to water his sheep. We know that in the custom of the country sheep are not watered from buckets, but the water is led into a dam from the well, and there is no doubt in point of fact that that was the state of things at the time the contract was made. At that time the only place to water the sheep would have been at the dam, into which the water would be taken by means of the pump. After the contract had been made the water-furrow was cut, by which part of the water of the well was led down to some gardens of the defendant. Plaintiff contends that he has the right now because water comes out of the well to the furrow to go to a point on the furrow a distance of 100 or 200 yards from the well for the purpose of watering his sheep. In my opinion this contention cannot be sustained. It is not clear that all the water of the furrow is from the well; on the contrary, part of the water is from another source. The effect of the furrow is not to exhaust the well—that is not the contention but it is maintained that if the pump had been going there was sufficient water in the well to lead into the dam. In my opinion, if the plaintiff wished to have the effect of the servitude, it was his duty to look after the pump; but he allowed the pump to go to rack and ruin, and then insists on following any of the water from this well an indefinite distance into plaintiff's ground. Servitudes cannot be construed in this way. The rule of the Court is to construe rights of this kind on private property very strictly, and strictly construed this servitude would confine the plaintiff to watering his sheep at the dam, or if at the furrow, only in the immediate vicinity of the well. Three hundred yards is not in the immediate vicinity. I am not prepared to say that within ten or twelve yards, or even twenty yards, would be an infringement of these rights. I reserve that point, because I am inclined to think that it was intended that the sheep should be watered at the dam. I think the plaintiff went too far from the well, and defendant was justified in impounding the sheep when they were at such a distance. I am of opinion that the judgment should be reversed. The only question is with regard to the two sheep lost. It would appear that there were two sheep short. It may be accounted for by a mistake on the part of the defendant or the poundmaster. But in any case that is not the ground upon which the action was brought. It was an action for illegal impounding, and not for negligence in dealing with the sheep. In order not to debar the plaintiff from his rights with regard to the sheep which were lost, the

judgment will be absolution from the instance. The appeal, therefore, will be allowed; judgment for the appellant with costs, and judgment entered for absolution from the instance with costs in the lower Court.

Their lordships concurred.

[Appellant's Attorneys, P. de Villiers; Respondent's Attorneys, Messrs. Van Zyl, Buissinné & Leonard.]

SUPREME COURT.

Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

BURDACK V. BURDACK. } 1896. Nov. 16th.

This was an action for restitution of conjugal rights.

Mr. Jones appeared for the plaintiff; defendant being in default.

Pauline Bertha Burdack, the plaintiff, said she was married on November 15, 1875, at Lichtersdorp, Germany. They came to the Colony in 1877 as emigrants, and acquired grounds near East London. There they stayed for three years and then removed to Brandspruit, between Burghersdorp and Aliwal, where her husband was a groom and she a cook. He went after eight months to Aliwal North, and she had not seen him since. He was a great drinker, and treated her very badly indeed. He had treated their three children also very ill. The children were now twenty-one, eighteen, and fifteen years old respectively. She was married in community of property, but now made no claim on her husband. In 1893 she had inserted a notice in the "Government Gazette," calling upon her husband to return.

A decree of restitution of conjugal rights was granted with costs, the Court ordering the defendant to return to or to receive the plaintiff on or before December 31, failing which the Court would grant a rule calling on defendant to show cause on January 12 why a decree of divorce should not be granted with costs, and why the plaintiff should not be declared entitled to the custody of the minor children, the rule to be served in the same manner as directed with regard to the intendit.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

FRY V. FRY.

This was an action for divorce on the ground of the husband's adultery.

Mr. Close for the plaintiff; defendant in default.

Wilhelmina Fry (aged twenty) said she was married to Frederick J. Fry in October, 1894, at S. Andrew's Church, Newlands. They lived together for about nine months, and then he left her and went to Malmesbury. She went after him, and they stayed together for about three months, and then they returned together to Newlands. After a few weeks he left her again, and went back to Malmesbury. In September, 1895, a child was born of the marriage, and she wrote to him; but he did not answer, and had sent nothing to her support. The child died. After a time she heard rumours of her husband's conduct, and she and her mother and an uncle went to Malmesbury, and found her husband living in a small room with another woman. Her husband was a painter, and played in the band.

Elisabeth Arendse, plaintiff's mother, spoke of the visit to Malmesbury. They spoke to the woman Adams, with whom Fry was living, and she said that he was now her husband.

A decree of divorce was granted with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

HASLER V. HASLER. } 1896. Nov. 10th.

Divorce—Adultery—Conjugal misconduct—Desertion — Condonation — Connivance—Recrimination.

In an action for divorce on the ground of the defendant's adultery, it is no valid defence that the plaintiff had by reason of his or her refusal to cohabit with the defendant conduced to the defendant's adultery, and it makes no difference whether such adultery was committed by the wife or the husband.

This was an appeal from the judgment of the High Court, Griqualand West, in an action brought by Margaret Hasler against her husband, George Hasler. In this suit the plaintiff claimed:

1. A decree of divorce on the ground of adultery.

2. The custody of the minor children.

3. That the defendant be declared to have forfeited his share of the community of property, also his right to any property already acquired or hereafter to be acquired by the plaintiff.

4. General relief.
5. Costs of suit.

The defendant claimed in reconvention:

(*a*) A divorce on the ground of adultery.

(*b*) In the alternative, a decree for the restitution of conjugal rights.

(*c*) In the event of non-compliance with such decree, a divorce on the ground of malicious desertion.

(*d*) Custody of the minor children.

(*e*) That plaintiff in reconvention be declared to have forfeited her share of the community of property, and also her right to any property already acquired or hereafter to be acquired by the defendant in convention.

(*f*) General relief.

(*g*) Costs of suit.

The facts appear sufficiently from the judgment delivered in the Court below.

In delivering the judgment of the Court the learned Judge-President said that this was one of those cases in which it was difficult to decide the most just and equitable method of solving the difference between the parties. The plaintiff sued the defendant for divorce on the ground of adultery. Defendant denied the adultery, and declared that plaintiff had been living an immoral life in Kimberley, Johannesburg and elsewhere, and was not a fit person to have the custody of the minor children. There was, in his lordship's opinion, no reasonable doubt that the defendant had been unfaithful to the plaintiff. He found, therefore, that the plaintiff had proved *prima facie* her right to a divorce, and also that the defendant had failed to prove his plea as to misconduct by the plaintiff. With regard to the alleged misconduct with Jenkins and Roberts, which had been dragged out again, the plaintiff's conduct was indiscreet, but there was a wide difference between indiscretion and adultery. As to the allegations of conjugal misconduct after she had gone to the Transvaal, the evidence of the commission had not been put before the Court. So far, therefore, the case was in favour of the plaintiff on the issues raised. The plaintiff's own conduct however, was not so unimpeachable as to entitle her absolutely to the relief asked for. The Court would not be exceeding its discretion in ordering a decree of judicial separation, with dissolution of the community of property. With regard to the custody of the children, the father was the natural guardian. The plaintiff, he observed, shook her head at that proposition. The father was the natural guardian. His lordship was not satisfied that the particular instances of conjugal misconduct had been sufficient to abrogate the father's rights. Neither was he satisfied that the plaintiff was altogether a person whose methods and means of life were so satisfactory and unimpeachable as to justify the Court in giving her control of the children. If the father wished to assert his right as the natural guardian, he would have to provide for their maintenance and education, and if he were prepared to do so, the Court would order the custody of the children to be given to him, but subject to the provision that for the present the Court saw no reason to disturb the arrangement by which it was alleged that the children were being educated in a Catholic convent. Both father and mother ought to have access to the children at all reasonable times, and liberty would be reserved to the plaintiff and the defendant to make any further application that might be required.

The following reasons for the judgment were given by the learned judge:

In this case the Court was of opinion that adultery committed by the defendant had been proved, but that there was not sufficient evidence of similar misconduct on the part of the plaintiff. A commission had been issued to take evidence at Johannesburg on this part of the case. On its return, it was perused by the members of the Court, but, on the case being resumed, it was not put in by the defendant, the evidence taken in support of these allegations being presumably regarded as insufficient.

Independently, however, of the commission evidence, the Court considered that previous conjugal misconduct on the part of the plaintiff had been proved conducive to the defendant's adultery, and justifying the Court in refusing a divorce on that ground. It appeared that, from an early stage in their married life, the parties had been living apart; that in 1890, when the defendant had provided a home for the plaintiff at Kenilworth, near Kimberley, she preferred to keep a lodging-house at Kimberley, and that, in 1892 or 1893, when he asked her to return from Johannesburg, and again offered to provide a home for her, she refused to return and resume cohabitation. The defendant had made several unsuccessful attempts to effect a reconciliation. There had probably been faults on both sides, and there was apparently no prospect of the resumption of conjugal relations on a satisfactory basis.

In all the circumstances, the Court thought that the order made would do substantial justice between the parties. There was not sufficient to absolutely deprive the father of his rights as the natural guardian of the children, if, as stated, he was prepared to provide for their maintenance and education. The Court, however, expressed its opinion that if, as was alleged, the children were being educated in

a respectable boarding school or some similar institution at Johannesburg, such arrangement should not for the present be disturbed, and that, if it became desirable to make other arrangements in the premises, it would probably be necessary for the application on the subject to be made to the High Court of the South African Republic.

P. M. LAURENCE.

The respondent was in default on the appeal.

Mr. Schreiner, Q.C. (with him Mr. McGregor), for the appellant (plaintiff in the Court below), referred to *Voet* (24, 2, 7); *Brouwer* (De Jure Connub., p. 756); Fraser (Law of Scotland, Vol. II. p. 11. 96); *Burge* (Vol. I, pp. 654, 657); the English Statute, No. 20 and 21; Vic. C. 85, which limits the operation of the Act to England); *Harris* v. *Harris* (2 Hog. Eccles. Repts., 376); *Biccard* v. *Biccard* *(2 Sheil, 353); *Van Leeuwen* (Cens. For. Pt., I. 1, Bk. c. 15, section 7); *Goodison* v. *Goodison* (Buch. 1874, p. 143); †*Eksteen* v. *Eksteen* (2 Sheil, 44); *Farmer* v. *Farmer* (1 Searle, 227); *Yeatman* v. *Yeatman* (L.R. 2, P. and M. 187); *Cunningham* v. *Cunningham* (28 L.J. (N.S.), 101); *Bishop* (husband and wife, section 90, Vol. II.). The cases in which the Court has discretionary power in actions for divorce are where there is "recrimination," as the Scotch have called it, or condonation, or connivance. (In Scotch law even this ground of Recrimination is not allowed.) Otherwise in cases where the adultery is proved the Court *must* grant the divorce.

De Villiers, C.J.: The question to be determined in this appeal is whether there has been such a degree of conjugal misconduct on the part of the plaintiff as to disentitle her to a decree of divorce and the further relief asked for. The only forms of misconduct which have ever been held by this Court to deprive a plaintiff of the right to a divorce on the ground of the defendant's adultery are (1) adultery on the part of the plaintiff and (2) condonation of or connivance at the defendant's adultery. If the judgment of the Court below be correct a third form of misconduct must be added to the list, and that is desertion on the part of the wife if she be the plaintiff. Where the husband is the plaintiff the opinion of *Voet* (28, 2, 7) is clear that his refusal to cohabit with his wife does not disentitle him to a decree of divorce on the ground of adultery. *Voet's* opinion was adopted by this Court in *Goodison* v. *Goodison* (Buch. 1874, p. 143), where it was held that the absence of the husband leaving the wife unprovided does not excuse the adultery of the wife or afford a defence to an action for divorce. Unless a distinction is to be drawn between the case of a husband and that of a wife committing adultery, these authorities appear to me to be conclusive in the present case. In this Court no such distinction has ever been allowed. From a social point of view something can be said in favour of the English law, which does not attach the same legal consequences to the adultery of the husband as it does to that of the wife, but from a legal as well as from a moral point of view I can see no ground for any distinction. There is certainly no authority in our law for such a distinction. In the passage from *Voet* which I have cited he mentions the case of the wife committing adultery by way of illustration, and not for the purpose of excluding a wife who has deserted her husband from the right to a divorce on the ground of his adultery. In refusing a decree of divorce to the plaintiff the Court below seems to me to have been unconsciously influenced by the English law. It is unnecessary for the purpose of the present case to hold that no misconduct short of adultery or connivance or condonation on the plaintiff's part would justify the Court in refusing a decree of divorce where the defendant's adultery has been proved. It is possible to imagine cases in which there may have been such gross misconduct on the plaintiff's part and such temptation placed in the defendant's way as to make it in the highest degree inequitable to give the plaintiff any relief whatever. I must reserve my opinion as to what the decision of the Court should be in such a case. The present case is certainly not of such a nature. The only proof there is of the plaintiff's alleged misconduct is that she refused to continue to cohabit with the defendant, but her explanation is that her husband had been living with a coloured woman. Even, however, if this explanation had not been given the bare desertion by the wife of the husband is not such misconduct as to deprive her of the right to a divorce for his adultery, even though such adultery took place after her desertion. As a fact, all the misconduct in the present case has been on the defendant's part. He does not specifically deny the plaintiff's statement as to his having lived in adultery with a coloured woman before his wife deserted him. He brought an action against her, for divorce on the ground of her adultery, but wholly failed to prove it. When sued by her for

* 9 Juta, 473. † 9 Juta, 100.

divorce on the ground of his adultery, he again brought forward the same charges against her and at the trial gave evidence which it is impossible to reconcile with his evidence in the previous case. The Court below refused to grant a decree of divorce or to give the plaintiff the custody of the children of the marriage, but granted a decree of separation *a mensa et thoro* and dissolution of community, and gave the defendant the custody of the children. This judgment must in my opinion be reversed, with costs in this Court and in the Court below, and a decree of divorce must be granted and the plaintiff declared to be entitled to the custody of the minor children, with right of access for the defendant at all reasonable times and places. The declaration contains a further prayer that the defendant may be declared to have forfeited his share of the community of property. I am astonished at the insertion of such a prayer after the remarks which the Court has frequently made upon similarly ill-drawn pleadings. The Court will declare that the defendant has forfeited all benefits which might accrue to him by virtue of the marriage in community.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

HOFMEYR v. SHAW. } 1896, Nov. 12th.

Mr. Graham applied for the final adjudication of defendant's estate.

Granted.

ADMISSIONS.

Mr. McLachlan moved for the admission of Charles Jacob François Theron as an attorney and notary.

Granted.

Mr. McLachlan also moved for the admission of Michael Louw Krige as an attorney and notary.

Granted.

Mr. Benjamin moved for the admission of Mr. Percival William Elliot as an attorney, notary, and conveyancer.

Granted.

REHABILITATIONS.

Re H. J. VAN DER HOVEN.

Mr. Close applied for the rehabilitation of Hendrick Johannes van der Hoven.

Granted.

Re MAARTEN SLABBER JACOBS.

Mr. Close applied for the rehabilitation of Maarten Slabber Jacobs, H.son.

Granted.

GENERAL MOTIONS.

THE PETITION OF WM. G. MACDONALD.

Mr. Graham applied for an order relieving petitioner from the declaration of lunacy pronounced upon him in January, 1895, and from operation of the order of this Court of 29th February, 1896, appointing a curator to administer his property, he having recovered, and being desirous of obtaining a declaration that he is of sound mind and capable of managing his own affairs.

The Court granted an order in terms of the prayer.

THE PETITION OF THE CONSISTORY OF THE DUTCH REFORMED CHURCH AT DORDRECHT

Mr. Searle, Q.C., applied for authority of the Registrar of Deeds to register in the name of petitioners title of certain erf, No. 16, in the said township, sold by them to John E. Woodward in 1856, but never occupied by him, but abandoned and left derelict and practically in possession of petitioners, who sold and transferred it to Johannes C. Theron, who sold it to Stephanus A. Smit, and is now unable to give transfer by reason of the original transfer to Woodward remaining uncancelled.

The Court granted an order calling upon any person who may have or claim to have any right to the land in question to establish their claim by the last day of term, or be for ever barred; and to show cause why the transfer in favour of Woodward should not be set aside; the rule to be published once in the "Frontier Guardian."

IN THE MATTER OF THE MINOR POTGIETER.

Mr. Tredgold applied for authority to the Registrar of Deeds to pass

transfer of certain landed properties in the district of Oudtshoorn, owned by the said minor, and sold by him for his own benefit, the shares being too small to be cultivated with profit, and he being about to leave the country.

The Court granted an order in terms of the prayer.

GROBBELAAR V. GOUS.

Mr. Searle, Q.C, applied for the attachment of certain two inheritances due to the respondent, *ad fundandam juri:dictionem* of this Court in an action about to be instituted by applicant by edictal citation, for the recovery of an amount due on a promissory note.

The Court granted an order in terms of the prayer, citation returnable on January 12, 1897, personal service if possible, failing which one publication in "Ons Land."

DE KOCK V. RESIDENT MAGISTRATE OF CALEDON. 1896. Nov. 12th.

Construction—Statutes—Enrolled agent.

Where the language of a statute is unambiguous it should be construed according to its plain meaning, and not according to what the Court might conceive to have been the real although unexpressed intention of the Legislature.

The 8th section of Act 43 of 1885 enacts that "no person in any district where not less than two attorneys are in practice, shall be admitted and enrolled as an agent."

Held *that a Magistrate cannot be compelled to enrol an agent in a district where three attorneys are in practice, even although they are in partnership with each other.*

This was an application for an order requiring the respondent, upon payment by applicant of the proper fee, to enrol him as an agent entitled to practise in the Court of the Resident Magistrate, Caledon, under the provisions of Act No. 20 of 1856.

The following affidavit was filed by the applicant, Pieter Hendrick de Kock:

1. I reside in the town of Aberdeen.

2. I am of full age and of good fame and character.

3. Being anxious to be enrolled as an agent of the Court of the Resident Magistrate for the district of Caledon, I applied to the said Resident Magistrate to be so enrolled, and offered and tendered to pay the fee by law payable in respect of such admission.

4. I have received from the Resident Magistrate the letter hereunto annexed declining to admit me as an agent of his Court on the ground that there are three attorneys practising in the said district.

5. It is true that there are three attorneys in the said district, namely, Messrs. Dempers, Moore and Krige, but they practise in partnership and under the firm of Dempers, Moore & Krige.

6. The said Magistrate has informed me that he has no other ground of objection to enrolling me than stated in his said letter.

The letter from the Resident Magistrate (referred to above) was in these terms:

"I have the honour in reply to your letter of 4th August last to inform you that I regret that I cannot comply with your request to admit you to be enrolled in this Court as an agent in terms of section 36, Act 20 of 1856, as there are three attorneys practising here, and section 8 of Act 43 of 1885 positively prohibits any person being enrolled where there are even two attorneys practising."

Mr. Innes, Q.C., for the applicant: The Court must look at the spirit of Act 43 of 1885, section 8; which surely means that there must be two *independent* attorneys in the district. For the purpose of this section the three attorneys at Caledon are one—they constitute one firm. In *Van Wyk* v. *Resident Magistrate, Willowmore* (6 Sheil, 225) a strict interpretation was given to the section but in that case there were two independent attorneys each entitled to practise in the same Court.

The Chief Justice: Suppose A and B were partners and in a case C v. D, C wants A and D wants B—then if A and B agree that the proceeds were not to be divided in the partnership, would that beunprofessional?

Mr. Innes: The Law Society would be bound to intervene, and the practice would be undoubtedly dangerous to the interests of the public. In the section quoted, the words, "in practice" mean in independent practice.

De Villiers, C.J.: If the Court were allowed to speculate as to the intentions of the Legislature, independently of the language actually used, it would have little doubt as to the applicant's right to be admitted as an agent in the Caledon Magistrate's Court. There are three attorneys in practice in the district, but they are in partnership with each other, and the same reason therefore exists for admitting an agent as if there had been only one attorney in practice. But the 8th section of Act 43 of 1885 enacts in unambiguous language that "no person in any district where not less than two attorneys are in practice,

shall be admitted and enrolled as an agent." The Court is now asked to read this section as if the words "independent practice" had been used instead of the single term "practice," or as if a proviso had been added that "a firm of two or more attorneys shall for the purposes of this Act be regarded as one attorney." I confess that I regard it as a very unsafe mode of construction to attach more weight to the presumed object of the Legislature than to the language actually employed. The safer course is, as was said in *De Villiers* v. *Cape Divisional Council* (Buchanan Rep., 1875, p. 65) to observe the literal and grammatical sense of the words employed, and leave it to the Legislature—which is always at hand for the purpose—to amend the law in case such construction should not carry out its real intention. According to the plain meaning of the 8th section there are three attorneys in practice in the Caledon district. They do not cease to be three in number because they have agreed to become partners. If public convenience requires that litigants should have the benefit of independent legal assistance, other attorneys will soon be induced to settle in the district. It may be said that there is a danger of their being also amalgamated in the existing form, but there must be a limit to this process of amalgamation. The convenience of the public should not blind the eyes of the Court to the actual language used by the Legislature. If speculations were to be allowed as to the object of the Act independently of its express language much might be said as to the undesirability of allowing any person—upon his bare statement that he is of fair fame and character, whatever his other disqualifications might be, to be admitted and enrolled as a law agent. Having regard to the plain language of the 8th section I am not prepared to make any order to compel the Magistrate to admit the applicant.

[Applicant's Attorney, W. E. Moore.]

QUEEN V. DEYDIER. { 1896. Nov. 12th.

Liquor—Licensing Acts—Sale to child—Guilty intention—Undisclosed principal.

In a prosecution for selling liquor to a child under fifteen in contravention of the Liquor Licensing Act, 1883, section 73, it is no defence that an adult had sent the child to buy the liquor, if the defendant delivered the liquor in the belief that he was selling it to the child.

This was an appeal from the conviction of the accused before the Resident Magistrate of Caledon, on a charge of contravening the provisions of the Liquor Law, by selling a bottle of brandy to a person under the age of fifteen years.

Before the Resident Magistrate the accused, Auguste Marie de Possel Deydier, liquor licence holder, was charged with the crime of contravening sub-section 6, section 73, Act 28 of 1883, as amended by section 19, Act 25 of 1891, in that upon (or about) the 29th day October, 1896, and at (or near) Caledon in the said district, the said Auguste Marie de Possel Deydier did wrongfully and unlawfully and knowingly permit to be sold at his canteen situate on erf No. 3, Block B, Dempers-street, one bottle of brandy to a certain boy "Henry" through his canteen man "Carolus Carelse" and thereby contravene the said section of the Act. The prisoner being arraigned pleaded "not guilty."

The Resident Magistrate however found him guilty and sentenced him to a fine of £2, or twenty-four hours' imprisonment with hard labour.

The following evidence was adduced at the trial:

Henry stated: I live with Marney Theunissen. I am about twelve years of age. I know the accused. I know also the canteenman of the accused in Dempers-street. On Thursday the 29th I went there with money in my hand, 9d. (nine pence), and bought a bottle of brandy from the canteenman of Mr. De Possel's bar. I know the bottle produced by the cork. The contents now produced are brandy and the bottle is the identical one. I gave the bottle of brandy to Marney Theunissen, with whom I reside. It was towards evening when I purchased it. Marney Theunissen told me to go and buy the brandy. I bought the brandy for him. If he had not told me to go, I would not have gone. I have never before been to the canteen. He told me to go to the canteen.

Marney Theunissen stated: I live in the village. I know the accused. I know the canteenman; the last witness lives with me; he is about twelve years of age. On last Thursday evening at 7.30 I gave him the bottle now in court. I gave him 9d. in coppers. I told him to fetch half a bottle of brandy at accused's canteen. He brought the bottle. I gave it to the Chief Constable intact. I recognise the liquid as brandy. The Chief Constable asked me to send Henry. The last witness is in my service. I am a Good Templar.

I don't know why the Chief Constable called me. The Chief Constable also gave me the money and the bottle. It is the first time I sent the boy to the canteen. If I had not sent him he would not have gone. The boy did not partake of the brandy.

Arthur William Taylor stated: I am Chief Constable. I know the accused. I know the canteenman by sight. It was reported to me that liquor was sold out of the canteen to children under the age of fifteen years. And acting on instructions I saw Theunissen in the evening of the 29th October last. I gave him nine pence and a bottle, and asked him to send the boy Henry to the canteen for liquor. I followed the boy down to the canteen, and saw him go in and come out with the bottle which he handed to Marney Theunissen. The contents was brandy. I lodged the information at the office.

There was no evidence for the defence.

The Resident Magistrate's reasons for his judgment were as follows:

I found that the case was clearly proved against the prisoner. As stated in the evidence of the Chief Constable it was reported to him that the prisoner was in the habit of selling liquor to children under the age of fifteen years. and in order to entrap the prisoner (which I do not approve of as a rule) it was necessary to send the boy Henry to purchase the liquor in this case.

The case quoted *Queen* v. *Robertson* (9 Juta, 300), is not analogous to the present one, as the boy "Henry" was in the service of Marney Theunissen.

The canteenman of the prisoner never asked who the liquor was for. Neither did he know who the liquor was for, and if so, it is known that the master—Marney Theunissen—is a total abstainer.

Mr. Roos for the appellant: There is no evidence to convict under the section charged. The accused should have been charged under the amending Act No. 22 of 1894. The section charged as amended by Act 25 of 1891 only provided for the offence of *selling*. On this point see *Queen* v. *Robertson* (9 Juta, 301).

The Chief Justice: Yes but Act 22 of 1894 says, "from and after this Act the Act of 1883 shall be read as amended by this Act."

Mr. Roos referred to *Story on Agency* (page 327); *Queen* v. *Goldman* (9 Juta, 313); *Regina* v. *McWilliams* (7 E.D., 15).

The Chief Justice: The real point is that in the summons the word used is only *sold*.

Mr. Sheil (Acting Attorney-General) for the Crown: It is submitted that the word *sold* is really surplusage, the section charged is the point Of course the act done should be proper ly specified, but on the summons as it stands the Resident Magistrate was justified in convicting, for as far as the barman is concerned the point is that he sold the liquor to the *child*. The sale by the barman is of course a sale by master: *Queen* v. *Murtha* (3 H.C., 165).

Mr. Roos: If this were a civil case the boy as *impubes* could not make a contract, hence there was no sale in this case.

The Chief Justice said: It would appear that neither the Magistrate nor the defendant's agent was aware of the provisions of Act 22 of 1894, which amends the Liquor Licensing Act, 1883, by placing the delivery of liquor to a child under fifteen on the same footing as the sale to such child. The defendant's counsel now contends that there was only a delivery and not a sale to the child, and that therefore the summons is defective in making no reference to the Act of 1894. The absence of such a reference is not however fatal to the summons. The charge was that of contravening the 73rd section of the Act of 1883. It would have been more regular to add the words "as amended by Act 22 of 1894," but it was not necessary seeing that the 1st section of the later Act enacts that the Act of 1883 shall be read and construed as amended by the Act of 1894. It is a more serious objection to the summons that in stating the facts which constitute the offence, the summons alleges a sale to the minor and not a delivery only. I proceed to inquire, therefore, whether the evidence supports such an allegation. The child was sent by an adult to buy the brandy at the defendant's canteen, but the barman who delivered the brandy to the child had no reason to believe that the child was buying the brandy for any one else. No inquiries were made and the sale was effected to the child, with whom alone the barman could suppose he was dealing. It is said that the child could not legally enter into a contract of purchase and therefore there was no sale to him, but there is no authority for such a proposition. Under certain circumstances a sale to a minor may be set aside, but in no case can this be done at the instance of the seller. The sale is binding upon him whatever right others may have to set it aside. The two cases relied upon by the defendant's counsel do not support his contention. In *Queen* v. *Robertson* (9 Juta, 299) the child had been sent by its mother to buy the liquor, and informed the seller of the fact. The Court accordingly held that the sale was to the mother and not to the child. In the case of *Queen* v. *Goldman* (9 Juta, 313) the child had been sent by a constable to buy the liquor, but he told the barman that the liquor was for his mother.

his mother. The Court held that the delivering of the liquor to the child did not constitute a sale to the child in terms of the Act, inasmuch as the barman did not intend to sell to the child but to the mother and the liquor was in fact bought for the constable. The Court held that if the child had really bought the liquor for himself, the publican would have been guilty. In the present case the child bought liquor for a constable but, so far as the defendant is concerned, he had the guilty intention of selling to the child. Although the child was buying the brandy for a principal, that principal was not disclosed to the defendant. If it had been an ordinary case of selling goods to an agent for an undisclosed principal the seller would have been entitled to recover the price from the agent as being the person with whom the seller believed that he was contracting: *Wright* v. *Williams* (8 Juta, 168). The fact that he has a remedy against the principal when disclosed does not debar him from suing the agent. In the present case there was proof of the guilty intention, which was rebutted in the two cases cited, and I am therefore of opinion that the appeal against the conviction must be dismissed.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn.]

QUEEN v. CONROY. } 1896. } Nov. 12th.

This was an appeal from a decision of the Resident Magistrate, Worcester, in which the accused was charged with the contravention of par. 7, section 73, Act 28 of 1883, in unlawfully exposing liquor for sale during a time when he was not authorised by the licence to sell or allow any liquor purchased before the hour of closing to be consumed on such premises.

The prisoner pleaded not guilty, but was found guilty and sentenced to pay a fine of £1.

Against this conviction the appeal was now made.

Mr. Sheil (Assistant Law Adviser) for the Crown.

Mr. Searle, Q.C., for the appellant.

From the evidence before the Resident Magistrate it appeared that the accused had a liquor licence under which he was entitled to sell liquor at his bar at the Commercial Hotel till 12 o'clock midnight; that the Chief Constable (Thacker) and two assistants, Hopewell and Jebb (also police constables), were on duty near the hotel and observing that the serving of drinks was being continued after midnight (as alleged by him) entered the bar. There was, however, great conflict of testimony as to the precise time at which the constables did enter the premises.

After argument,

The appeal was dismissed.

The Chief Justice: There was no doubt considerable zeal shown on the part of Sergeant Thacker to gain a conviction against this appellant. He had had a quarrel with him and had sent a demand for damages for an alleged slander upon his character, but the more zealous he was the more one would suppose he would be careful to be in the right. His evidence is that he heard the church clock strike twelve before he went into the canteen, and in this statement he is supported by the evidence of two constables, regarding whom it may be said they had no grudge against the appellant. Upon another more important point they fully support him, and that is as to what was the time indicated by the canteen clock. All three agree that this was seventeen minutes past twelve. Appellant says this clock was ten minutes fast, and assuming that to be correct that would make it seven minutes past twelve. The appeal was postponed in order to see what the result would be of the trial of an important witness for the prosecution for perjury; and the result was that this witness, Hopewell, was acquitted, so that to that extent the case for the appeal is now weakened. On the other side it is quite true there are witnesses who swore it was not twelve o'clock, and that after Thacker had entered the premises they heard the church clock strike twelve. It is quite possible they made a mistake as to this, and that the clock might have struck the quarter or half hour. The Magistrate believed the witnesses for the prosecution. Can we now upon this evidence say the Magistrate is wrong? The Magistrate is the best able to judge of the credibility of the witnesses. I must add, however, that if the Magistrate had acquitted Conroy I should not have found fault with his judgment. As to the objection to the form of the summons, the Magistrate simply followed the words of the section of the Act. The main charge is keeping licensed premises open for the sale of liquor, and the Magistrate found the appellant guilty on that charge. The appeal must be dismissed.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

MARTIN'S TRUSTEE v. DE VILLIERS. { 1896. Nov. 13th.

This was an action brought by the plaintiff against Petrus de Villiers, of Uitenhage, for the sum of £150 12s. 4d., balance of account shown to be due to the plaintiff, and costs.

Mr. Schreiner, Q.C., appeared for the plaintiff. Defendant in default.

George Copeland, clerk in the employ of Mr. G. Montgomery Walker, the attorney for the plaintiff, said he had had charge of plaintiff's case. An order had been granted directing defendant to file an account. Accounts had since been rendered by Mr. C. C. Silberbauer, defendant's attorney, showing the sum of £150 12s. 4d. to be due by defendant to plaintiff. The plaintiff was willing to take judgment for that amount. Demand had been made upon the attorney for the defendant for payment of that amount, but there had been no reply.

Judgment for plaintiff for the amount claimed, with costs.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn.]

MEITJIE v. MATYELE. { 1896. Nov. 18th.

Magistrate's Court—Jurisdiction—Exception—Unlawful detention—Summons—Value of goods detained.

Where a summons in the Magistrate's Court for the unlawful detention of property alleges the value of the property to be £20, and claims only that amount as an alternative to the claim for the restoration of the property, it is not a valid ground of exception that the property is worth more than £20, and that therefore the Court has no jurisdiction.

This was an appeal from the decision of the Resident Magistrate, Stockenstrom, in an action in which the appellant sued the respondent.

The summons set forth that on or about the 28th day of August, 1896, the defendant did wrongfully and illegally possess himself of certain 24 head of cattle, the property of or in the lawful possession of the plaintiff, of the value of £20 sterling, or thereabouts. The plaintiff having duly demanded the return of the said cattle, the defendant notwithstanding unjustly detains the same from her. Wherefore plaintiff prays that the defendant may be adjudged to restore to her the said cattle aforesaid forthwith, or as an alternative pay the sum of £20 sterling, as damages.

The defendant's agents took exception to the summons on the grounds: "1. That it is vague, defective, and bad in law, inasmuch as plaintiff claims restoration of certain 24 head of cattle without the alternative prayer for payment of the value thereof, and further claims damages without setting forth grounds upon which such claim is founded, in consequence of which the defendant is prejudiced in his defence.

2. "That the case is beyond the jurisdiction of the Court inasmuch as plaintiff claims from defendant restoration of certain 24 head of cattle, alleging the value thereof to be £20 sterling, whereas the value of such cattle exceeds the said sum of £20 sterling."

In support of the exception the agent called William Turwin, who stated: I am a farmer, residing at Woeburn, in the district of Victoria East. I know the defendant in this case. He has lived on my property for six years. I know all the stock he had in his possession. I saw him remove them. I produce the pass (put in, marked A) I gave him. I value the cattle at £2 10s. to £3 each on an average.

The Resident Magistrate upheld the exception and gave as his reasons:

1. The summons should set forth clearly the nature and cause of action or complaint, and the relief sought by the plaintiff. See *Van Zyl's Theory of the Judicial Practice* (p. 22, and form of summons, p. 57). When an action is brought to recover possession of any property it is necessary in the summons to allege the value of such property and to claim the restoration of the property or payment of the value.

This has not been done in this case.

Restoration of twenty-four head of cattle is demanded, or £20 damages. Damages for what? For having wrongfully and illegally taken possession of twenty-four head of cattle, or is it that plaintiff considers £20 their value? No costs are prayed for.

2. From the evidence of Mr. Turwin it would appear that the twenty-four head of cattle in question are worth from £60 to £70 sterling, and therefore I think, following the case of *Greyling* v. *Penny* (5 E.D.C., p. 221), the claim is beyond the jurisdiction of this Court.

I consider the summons vague and indefinite and, if not actually tricky, misleading, and am of opinion that both exceptions must be upheld with costs.

Against this decision the appeal was now brought.

Mr. Graham for the appellant: The Resident Magistrate was wrong in upholding the exceptions. Section 8, Act 20 of 1856 (sub-section 2), shows the Resident Magistrate's jurisdiction. We claim cattle or £20 as damages. It is true we do not follow the form in schedule C of Act 20 of 1856 quite closely—it gives form "*£—or value.*" We pray "£20 or *damages*," but in the summons we do bring up the value as £20 or thereabouts. We are bound by that statement of value; it puts us in the same position as if we had abandoned a portion of our claim. The Resident Magistrate could not give judgment for specific performance—he would have to give judgment for the alternative. See *Van der Walt* v. *Hawkins* (3 E.D., 31); also **Bam's Executors* v. *Haupt* (1 Sheil, 198); *Van der Westerhuizen* v. *Cohen Bros.* (5 Sheil, 56).

Mr. Searle, Q.C., for the respondent. The true rule is—if there is any claim in a summons which is beyond the jurisdiction of the Resident Magistrate, he is ousted if the claim is excepted to and is not amended in court. The only difference between *Bam's case* and this, is that in the former case the value which was alleged was beyond the Resident Magistrate's jurisdiction. In this case the value is alleged as within his jurisdiction. Can a man put in the summons a fictitious value on the property so as to give the Resident Magistrate jurisdiction? It is not, as the appellant contends, merely abandoning portion of his claim. The jurisdiction could be conferred if there were such an abandonment, but there is no actual abandonment here. The true value of these cattle is far over £70.

The Chief Justice: Yes, but it is not alleged so in the summons. Is not that the test?

Mr. Searle: No actual abandonment is made. See *Le Roes* v. *Goldie* (5 Sheil, 392). Where plaintiff asks for specific performance and the alternative is, say, £10 damages, if no amendment is asked for when an exception is taken, the plaintiff must stand the risk.

The Chief Justice: But is there any decided case where the Resident Magistrate's jurisdiction is held to be ousted by an *exception* as to jurisdiction where the claim as in the summons itself is *prima facie* within his jurisdiction, quite apart from what is proved in the course of the case itself?

Mr. Searle: *D.C., Riversdale* v. *Pienaar* (8 J., 352) shows at least that no jurisdiction can be voluntarily conferred by the parties where the Resident Magistrate has no jurisdiction. We rely on section 8 of Act 20 of 1856; this is not a case of debt or damages so far as the first claim is concerned, and if first claim is out of jurisdiction the result of all the decided cases is to show that the Resident Magistrate's jurisdiction is ousted. In Schedule C the form of summons is curious, the summons it directs must formally contain a prayer for delivery, which the Resident Magistrate cannot enforce even if he does order it. But this summons is not even in Schedule C form, and moreover, if the evidence is gone into, the value is clearly £60 or £70. The evidence is uncontradicted by plaintiff. It is a misuse of terms to say that plaintiff is abandoning a part of his claim on such a summons—if he asks for all the stock he abandons nothing, he can't give a fictitious value to give Resident Magistrate jurisdiction.

Mr. Graham in reply refers to section 7, Schedule B, Act 20 of 1856. It must be noted that *Le Roes' case* was for specific performance, which clearly cannot be enforced by the Resident Magistrate, and *ex facie* summons therefore the Resident Magistrate had no jurisdiction. But here *ex facie* summons the Resident Magistrate *has* jurisdiction and defendant cannot be prejudiced whether the value is £20 or £100.

The Chief Justice said: The only case which might at first sight seem to support the Magistrate's judgment is that of *Bam's Executors* v. *Haupt* (8 Juta, 253), but on closer inspection it is found to be very different from the present. It was an action brought by the purchaser of ten leaguers of brandy for delivery of the brandy or for £20 damages on non-delivery, and in the summons the price of the brandy was alleged to be £13 per leaguer. The report of the judgment is somewhat inaccurate in stating that the prayer was for the delivery of the brandy "or the payment" of £130 its value, for the delivery of the brandy could only have been claimed "on payment" of the £130. This sum the purchaser would certainly have been bound to pay if the brandy had been delivered to him, and he could not, after purchasing the brandy at £13 a leaguer, place the price at a lower sum. At all events he was bound by the value which he had mentioned in the summons. The present case is for the unlawful detention of certain cattle, and the value of the cattle is stated in the summons to be £20. By this valuation, which cannot possibly prejudice the defendant, the plaintiff is bound, after stating the value of the cattle to be £20, the summons claims the delivery of the cattle, or as an alternative the payment of £20 as damages. It is manifest from the whole context that this sum is claimed as being the value of the cattle. If judgment be

* 8 Juta, 253.

given as prayed the defendant could, by paying the £20, be relieved from delivering any cattle, and he could not again be sued for their value. If the defendant refuses to deliver the cattle or pay any money the plaintiff could issue execution only for the £20 claimed by him. Evidence was given on behalf of the defendant in support of the exception that the claim was for more than £20, but, in my opinion, the Magistrate ought to have overruled the exception seeing that on the face of the summons the claim was for not more than £20. The appeal must be allowed with costs, and the case remitted to be tried on its merits.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorneys, Messrs. Van Zyl, Buissinné & Leonard.]

PRINSLOO V. ROBBERTS AND ANOTHER. { 1896. Nov. 13th.

This was an appeal from the decision of the Assistant Resident Magistrate of Aliwal North, in which the appellant sued the respondents for £20 damages for assault. The attorney for the defendants raised the objection that the summons was bad in law, in that the Resident Magistrate had no jurisdiction to try the case since the amount at issue was £40, each defendant being sued severally (as well as jointly) for £20. The Resident Magistrate upheld the exception. Against this decision appeal was now made.

Mr. McGregor for the appellant; respondents in default.

The appeal was allowed with costs.

The Chief Justice: It is quite clear that although these defendants are both sued jointly and severally, "the one paying the other to be absolved," no more could be obtained than £20. The appeal must, therefore, be allowed with costs, and the case remitted to the Magistrate to be tried on its merits.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

QUEEN V. MCDONALD. { 1896. Nov. 18th.

Voluntary escape—Negligence.

On an indictment for "voluntary escape" the jury having found that the escape was allowed through the negligence, but not through the wilful act of the accused,

Held *in answer to a question reserved, that the finding amounted to a verdict of not guilty.*

This was the hearing of argument on a point reserved for the decision of the Court as to the finding of the jury at a trial held before the Circuit Court of Prince Albert.

The indictment was framed as follows:

That Jacobus John McDonald, lately a special policee-onstable, residing at Willowmore, in the district of Willowmore, is guilty of the crime of *voluntary escape*: In that, whereas, upon the seventeenth day of October, in the year of our Lord one thousand eight hundred and ninety-five, and at Willowmore aforesaid, one Sampie Roman was, on a charge of murder, duly committed by the Court of the Resident Magistrate of the district of Willowmore, to the care and custody of the gaoler of Her Majesty's gaol at Willowmore aforesaid, by warrant bearing the date aforesaid, there to be kept and imprisoned in the said gaol till brought to trial for the said crime or liberated in due course of law; and whereas, in pursuance of a certain other warrant, bearing date the twenty-seventh day of March, in the year of our Lord one thousand eight hundred and ninety-six, under the hand of the Resident Magistrate of the said district of Willowmore, the said Sampie Roman was delived into the custody of the said Jacobus John McDonald, and the said Jacobus John McDonald became and was then and there and thereby duly authorised as such special policee-onstable, to receive and safely keep the said Sampie Roman for the purpose of removing the said Sampie Roman from the said gaol at Willowmore to Her Majesty's gaol at Prince Albert, and in that, upon or about the twenty-ninth day of the said month of March, and at or near Middle Water, in the said district of Prince Albert, the said Jacobus John McDonald did wrongfully, unlawfully, voluntarily, and contemptuously permit and suffer the said Sampie Roman to escape and go at large whithersoever he would; whereby the said Sampie Roman did escape out of the custody of the said Jacobus John McDonald and go at large whithersoever he would, contrary to the duty of the said Jacobus John McDonald, so being a special constable as aforesaid.

Upon the facts the jury found "that the escape was allowed through the negligence but not through the wilful act of the accused."

The point reserved was whether this amounted to a verdict of guilty on the indictment as it stood.

Mr. Stoney appeared at the request of Court to argue the point reserved.

Mr. Sheil (Acting Attorney-General), after citing *Queen* v. *Moses* (1 E.D., 43), said that he was not prepared to contend that the verdict in this case amounted to a verdict of "guilty" on the indictment. The verdict of the jury really amounted to a verdict of "negligent escape," an offence well-known to the English law, but differing in many respects from the crime of voluntary escape.

Mr. Stoney was not called upon.

The Chief Justice said: The expression "voluntary escape," as I have before pointed out, is rather misleading (12 S.C.R., p. 437). The offence consists in voluntarily allowing a prisoner to escape from custody, and when once this definition is recognised there can be no doubt as to the answer to be given to the question reserved. The jury found that the escape was allowed through the negligence but not through the wilful act of the accused, and there was therefore an absence of the *voluntas* which was necessary to constitute his guilt. There may of course be such gross negligence as to justify a jury in concluding that the escape was connived at by the custodian, but where the finding of the jury negatives wilfulness on the part of the accused he cannot be found guilty of "voluntary escape."

The sentence must therefore be quashed.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

LEMUE v. SWAARTBOOI. { 1896. Nov. 16th, „ 19th.

Malicious prosecution—*Actio injuriarum*—*Actio calumniae*—Attorney-General—Solicitor-General—Refusal to prosecute—*Nolle prosequi*—Termination of prosecution.

In an action for malicious prosecution the Attorney-General's or Solicitor-General's refusal to prosecute constitutes sufficient proof of a termination of the prosecution in the plaintiff's favour.

This was an appeal from the decision of the Resident Magistrate, Albert, in a case in which the appellant was sued by respondent for £20 damages for malicious prosecution. The Resident Magistrate gave judgment for £7 and costs.

The summons called upon Calanie Lemue, a farmer, of Slangfontein, in the district of Albert, to appear before the Court of the Resident Magistrate of this district, to be holden at Burghersdorp on Monday the 29th day of June, 1896, to answer Zwaartbooi, a native servant at Streepfontein (but formerly in the employ of the said defendant at Slangfontein), in the district of Albert in an action for £20 as damages for malicious prosecution, and the summons alleged:

1. That on the 27th day of April, 1896, plaintiff was prosecuted in the Court for the Resident Magistrate at Burghersdorp under the Masters and Servants Act for desertion of service at the instance of the defendant.

2. That plaintiff was acquitted on the charge brought against him as aforesaid.

3. That the said prosecution was maliciously brought against plaintiff by defendant, and without any reasonable and probable cause.

4. That on the 9th day of May, 1896, plaintiff was prosecuted in the said Court at Burghersdorp, for the crime of perjury, at the instance of defendant.

5. That plaintiff was acquitted and discharged on the said charge of perjury.

6. That the said prosecution was maliciously brought against plaintiff by defendant, and without any reasonable and probable cause.

7. That by reason of the allegations made in the aforegoing paragraphs hereof plaintiff has suffered damage to the extent of £20, which sum or any part thereof defendant refused to pay.

From the evidence it appeared that the first case (heard in April) was dismissed by the Magistrate, the second (heard in May) was in the form of a preliminary examination the result of which was that the Solicitor-General declined to prosecute.

The following were the Magistrate's reasons for his judgment in the action for damages:

After carefully going through the records of the case with the evidence now adduced, I find that in the case tried on 27th and 28th April, last, in which defendant was complainant, I dismissed that case because I believed that a pass was asked for by Swaartbooi to come to town. At the time I did not give an order for costs, because from the length of time Swaartbooi remained away, there was some cause for the master to believe that he had deserted as he had more than ample time to have come to town, obtained advice, and returned to his work, but when it transpired that he had first to go to the Field-cornet and then to town, the delay was explained satisfactorily. As to the perjury case there is malicious *animus*. At first I hesitated to issue the warrant, as I believed that a pass was asked for, but in the face of the affidavits filed I considered that if Swaartbooi had asked, an opportunity to prove

it should be given in that examination. As I was called as a witness the Assistant Resident Magistrate held the examination. The Solicitor-General decided not to prosecute, and the Assistant Resident Magistrate's reasons are on record in the present case.

With the evidence now before me I have no hesitation at arriving at the conclusion first that, £2 was demanded from Swaartbooi, if not by Lemue himself then by his representatives, and that he was fully aware of the fact before he made the affidavit of 9th April last. Second, I am confirmed in my belief that a pass was asked for in consequence of that demand, Lemue did not in either instance that he gave evidence before me give it in a satisfactory way, and in the first case I did not believe him. In his evidence of 30th June he admits that he consulted his attorney as to recovery of £2 from Swaartbooi and was advised he had no claim, and further that he learned from Havinga that his representatives had demanded £2 from Swaartbooi for damage, the demand being made at Kuilfontein. There can therefore be no doubt that he sheltered himself in the perjury case by the use of the personal pronoun; although at the time he knew the demand had been made on his account by persons whom he had sent, and who acted on his behalf. He was annoyed at Swaartbooi refusing to pay the £2. He then instituted an action under the Master and Servants Acts. Having failed in this and feeling sore, he went and lodged affidavits of perjury in a malicious and vindictive spirit. Judgment must therefore be for plaintiff. Now as to damages, he paid £5 for advice on the two cases, £1 9s. 6d. for fine; he lost 8 sheep, say £4; he suffered imprisonment. Under all the circumstances, I think if he gets judgment for £7 and costs it will meet the ends of justice.

Judgment must therefore be for plaintiff for £7 and costs.

Mr. Joubert for the appellant referred to *Queen* v. *Rhymer* (6 J., 119), and *Queen* v. *Putsha* (6 E.D., 116). The summons alleges that the proceedings terminated in plaintiff's favour. They did not terminate: the Solicitor-General declined to prosecute. But the man has never been "in danger" yet, and by Ordinance 40 of 1828, sections 13 and 14, the private prosecution may still go on if the Attorney-General declines to prosecute, or the Attorney-General may proceed even though the Solicitor-General declines. The English authorities are unanimous that a *nolle prosequi* is not an acquittal. *Roscoe* (Criminal Cases, page 121); *Phillips* (on Evidence, page 111); *Greenleaf* v. *Redfield* (Vol. II., section 462); *Addison* (on Torts, page 451); *Easter* v. *Langer* (2 H.C., 508); *Mitchell* v. *Jenkins* (5 Bar. and Ad. 588).

Mr. Justice Buchanan: In *Wolstenholme Boyes* (Buchanan, 1878, page 175), an action for malicious prosecution was taken on Attorney-General's *nolle prosequi*, but the point was not raised. See also *Van Noorden* v. *Wiese* (2 J., 45), though the point was not specifically raised there.

Mr. Graham for the respondent: These present proceedings have terminated as far as it is possible for them to do. The English cases are applicable to other cases.

The Chief Justice: What is the Roman-Dutch equivalent of malicious prosecution? Isn't the suit in Roman-Dutch law only based on the ground of the damage? Isn't the acquittal therefore only required as proof of the malice, and is not the same purpose served by the *nolle prosequi*?

Mr. Graham: Yes, the Court seems always to have assumed this.

C.A.V.

Postea (November 19th).

Judgment was given in this case.

The Chief Justice said: For the first time the question has been raised in this Court whether, in an action for malicious prosecution, the refusal of the Attorney-General or Solicitor-General to prosecute constitutes sufficient proof of a termination of the prosecution in the plaintiff's favour. It has been urged on behalf of the defendant that such refusal is equivalent to a *nolle prosequi* which, according to the English law, has been held not to terminate the prosecution. Considering, however, the wide difference between the functions of the Attorney-General as well as the systems of criminal prosecutions in the two countries the English precedent cannot be regarded as binding here. A *nolle prosequi* to stay proceedings upon an indictment in England can, it is true, only be entered by leave of the Attorney-General, but it cannot be done until after the bill of indictment has been found. The finding of a true bill by the grand jury stands notwithstanding the Attorney-General's consent to a stay of proceedings, and so long as that finding stands there is proof of reasonable and probable cause of the prosecution. In this country the Public Prosecutor really performs the functions of a grand jury in addition to his other duties. He indicts where the preliminary examination discloses a *prima facie* case against the accused, but he declines to prosecute if there is no reasonable prospect of a conviction by an impartial jury. His refusal to

prosecute does not operate as *res judicata* so as to prevent a future prosecution for the offence charged, for it has been held that the Attorney-General may indict in a case where the Solicitor-General has declined to prosecute, and a private party who has suffered injury by any crime or offence may, subject to the restrictions mentioned in Ordinance No. 40, prosecute where the Public Prosecutor has declined to prosecute. But as far as the original proceedings are concerned, they are terminated by the Public Prosecutor's refusal to prosecute. This view has been taken for granted in numerous actions for malicious prosecutions which have been brought in this Court. It is said, however, that the objection has never before been taken, and that if it had been taken the Court would have been bound to allow it, seeing that the law relating to actions for malicious prosecution has been taken over bodily from the English law. I have been unable to discover the first case in which such an action has been held to lie in this Court, but whatever the date might be I am satisfied that the Roman-Dutch law itself furnishes the principles upon which such an action may be founded. The *actio injuriarum* was allowed in every case in which injury resulting in damage was maliciously done, or caused to be done, even although it was done in the course of a proceeding which was itself perfectly lawful (*Voet*, 47, 10, 2 and 3). Under the civil law a person against whom a false accusation had been maliciously laid could sue the *calumniator*, as the false accuser was called, either in the action *calumniae* or in the action *injuriarum*, but the former action seems to have fallen in disuse in the Netherlands. The *actio injuriarum*, however, remained in full vigour, although it was very rarely brought for malicious prosecution, owing, perhaps, to the complete control which the Public prosecutor had over the whole proceedings. He alone undertook the responsibility for every Prosecution, and the duty of the person laying the complaint was confined to a bare statement of the facts giving rise to the complaint. In *Neostad's Decisions* (2, 44) there is a brief report of a claim for damages for a malicious charge of theft, but it was made in reconvention in an action to recover the articles alleged to have been improperly appropriated, and the judgment of the Court was adverse to the claim on its merits. *Matthaeus* (De Crim., p. 642) appears to doubt whether the *actio injuriarum* could be brought against a person who has maliciously accused an innocent person of a crime although, strangely enough, he assumes that the *actio calumniae* could still be brought. He adds, however, that if the former action still lay, it could not be brought while the prosecution was pending, but after it had come to an end. *Injuriarum actio, si modo ea in calumniatorem datur, non pendente accusatione, sed finita datur.* The doubts expressed by *Matthaeus* have never been shared by this Court, nor, so far as I am aware, by any of the other South African Courts. The essential requisites of the action are proof of malice on the part of the defendant, and want of reasonable and probable cause for the prosecution. While a prosecution is actually pending, its result cannot be allowed to be prejudged by the civil action, but as soon as the Attorney-General, in the exercise of his quasi-judicial function, has decided not to prosecute, there is a sufficient termination of the original proceedings to allow of the civil action being tried. A different view of the law would lead to the extraordinary result that the clearer the proof of a person's innocence is the greater difficulty would he have in obtaining damages for false and unfounded charges maliciously made against him. On the other hand the law, as I have stated it to be, need not lead to any hardship on the defendant in an action for malicious prosecution. If, after the Solicitor-General has refused to prosecute, there is a reasonable probability that the Attorney-General will prosecute, or an undertaking by the defendant himself to prosecute without delay, it would be quite competent for the Court to postpone the civil trial until after verdict in the fresh criminal proceedings. In the present case there was no suggestion that the Attorney-General is likely to prosecute the plaintiff for perjury, or that the defendant himself intends to institute a private prosecution for that offence. The Magistrate having found that the charge of perjury had been maliciously laid, and without reasonable and probable cause, properly held that the plaintiff was entitled to damages. The amount awarded seems to me to be fair, and the appeal must therefore be dismissed with costs.

Mr. Justice Buchanan said: I find on looking into the authorities, that where the grand jury finds no true bill it is considered in English law a sufficient termination of the case to entitle the plaintiff to bring his action. With us the refusal of the Attorney-General to prosecute is more analogous to a grand jury finding no true bill in England than is the entering of a *nolle prosequi*. I do not think, therefore, that any sufficient reason has been shown for altering the long-established practice of this Court, and I concur in the appeal being dismissed, with costs.

Mr. Justice Maasdorp concurred.

[Appellant's Attorneys' Messrs. Sauer & Standen; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Chief Justice (the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

COLONIAL GOVERNMENT v. NATIONAL BANK, S.A.R. { 1896. Nov. 17th.

Bank—Joint Stock Company — Colonial branches—Licence duty—Act 3 of 1864, Schedule 17.

A banking company of which the principal place of business is in the South African Republic and of which none of the dealings is by the concession granted to and regulating such company described as to be carried on in this Colony is not liable to licence duty under Schedule 17 to Act 3 of 1864, notwithstanding that under a resolution of the directors one or more branches have been established in this colony.

This was a special case stated for the opinion of the Court as to the liability of the National Bank of the South African Republic to take out a licence under Schedule 17 of Act 3 of 1864 (as amended by Act 20 of 1884) in respect of a branch of the bank established in the Colony.

The following was the special case:

1. The plaintiff is Assistant-Treasurer of the Colony and Receiver General of Revenue, and as such entitled to sue in the present action. The defendant is the Nationale Bank der Zuid Afrikansche Republiek Beperkt, which has a branch business in Cape Town and is represented for the purposes of this action by its Chief Agent and Manager in this colony.

2. De Nationale Bank is a joint-stock company (formed under a concession granted by the Government of the South African Republic), and has a subscribed capital of £1,002,000 divided into 100,200 shares of £10 each. The head office, which is the principal place where the company's business is managed, is in Pretoria in the South African Republic; and the bank has a branch carrying on business in Cape Town and another at Port Elisabeth in this Colony.

3. There is nothing in the concession or articles of association of the Nationale Bank which specially describes its business as to be carried on in this colony; but paragraph 11 of the concession reads as follows:

"The domicile of the bank as well as the head office shall be at Pretoria, where the ordinary meetings of the directors shall be held.

"Branches and agencies may be established by resolution of the Board of Directors. The Government shall have the right to demand the establishment of an agency in each district at such a place as may appear desirable to it. Whenever the Board of Directors consider it desirable, and with the approval of the Government, local directors may be appointed from time to time whose sphere of business rights and duties are to be defined by the Board of Directors. The branches and agencies are entirely subject to the orders of the Board of Directors in Pretoria, who control as much as possible these branches; amongst other things by periodic inspection of the cash in hand"; and on the 8th of May, 1895, a resolution of the Board was passed authorising branches or agencies of the bank to be opened and started in the Colony of the Cape of Good Hope.

4. By Schedule 17 of Act No. 3 of 1864 as amended by Act No. 20 of 1884 it is provided that every joint-stock company carrying on business in this colony shall annually take out a licence, for which there shall be payable for every £100 of the subscribed capital of such company the sum of one shilling: and the term "joint-stock company" is defined by section 1 of the said schedule to embrace every company having a capital stock divided into shares of which company the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall by deed or other instrument regulating such company be described as to be carried on in this colony.

5. The plaintiff contends that the said bank is liable under tariff 17 of Act No. 3 of 1864 as amended by Act No. 20 of 1884 to pay the sum of £501 sterling, being the amount of licence money due for 1896. The defendant bank contends that it is not a joint-stock company within the definition hereinbefore referred to, and that it is not liable under the said Acts to pay the licence money claimed by the plaintiff.

Wherefore the parties pray for the judgment of this Honourable Court upon their respective contentions and upon the question of costs.

Mr. Sheil for the Government Section 1 of Schedule 17, Act 3 of 1864, gives the definition

of a joint-stock company. A question similar to the present one was decided in the *Colonial Government* v. *British South Africa Co.* (9 Juta, 284). The short point in the present case is: Is defendant a joint-stock company. Within the meaning of sub-section (*b*) of section 1 of the schedule it is admittedly a company? which carries on business in Pretoria as its headquarters. Compare the case of *Colonial Government* v. *Hepworth* (5 Sheil, 252.) There is no special mention of the Cape Colony in the articles of association or in the concession. But under section 11 of the concession the Board is authorised to establish agencies in this colony. In May, 1895, the Board authorised two branches to be started in the Colony. The branches owe their existence to the resolution of the Board by virtue of section 11, *i.e.* the resolution of the Board must be read as one with that section in the trust deed and the articles of association.

Mr. Justice Buchanan: The question is whether the establishment of agencies in the colony is not *ultra vires* in view of the trust deed.

Mr. Sheil: The Privy Council considered that point in Hepworth's case, but did not attach much importance to it. Now the word "Constitution" as used by the Privy Council in Hepworth's case must mean the same as instrument" in section 1 of the Schedule 17 of Act 3 of 1864. *Maxwell on Interpretation of Statute* page 351 (2nd ed.).

The Chief Justice: I suppose in Hepworth's case there must have been a resolution by the company to establish the agency here. The only point, Mr. Innes, that may distinguish the present from the British South Africa case and Hepworth's case is, Is the resolution of the Board, together with the concession equivalent to the "Constitution" referred to in Hepworth's case, *i.e.* the "instrument"? Can you incorporate the two together?

Mr. Innes, Q.C., for the defendant: But this must be always so. The bank acts under a concession — so did the Chartered Company. The Colony is not mentioned in the Charter. There are sections which show that the resolution of the Board is *intra vires*. The resolution is only the machinery for carrying out the objects of the company. The British South Africa Company and Hepworth must each have opened in the Colony by virtue of a resolution of their respective boards.

The Chief Justice said: There is nothing in the concession granted to the defendant company which describes any of its dealings as to be carried on in this colony. On behalf of the plaintiff it is said that as a resolution was passed by the directors authorising the establishment of branches of the bank in the colony, the requirement of the Act is satisfied. That would be so if the resolution can be regarded as part of the deed or other instrument regulating the company, but the terms of the concession do not justify such a construction. In the case of *Colonial Government* v. *British South African Company* (9 Juta, 280) there must have been a resolution authorising the company to carry on business in this colony, but the judgment of the Court, declaring that the company was not liable to the licence duty, proceeded upon the ground that the charter of the company did not specially authorise it to carry on its operations in this colony. That judgment was approved of by the Judicial Committee of the Privy Council in *Hepworth* v. *Colonial Government* (12 S.C. R., 111). It may be a hardship on other banks that the defendant company should escape payment of this duty, but it is for the Legislature and not this Court to amend the law. The judgment must be for the defendant with costs.

Mr. Justice Buchanan said: I have only to add to what his lordship the Chief Justice has just said, that when the Act of 1864 was passed a distinction was drawn between the companies mentioned under the headings (*a*) and (*b*). At that time the foreign companies had to pay a licence only upon one half, not upon the whole of their capital. That, I think, explains the object of the Legislature in framing the two definitions. In 1884 this distinction was done away with, but unfortunately the first portion of section (*b*) was allowed to remain. It would have better carried out the intention of the Legislature in 1884, if sections (*a*) and (*b*) had been entirely repealed as no longer necessary. But the construction of the Act as it now stands amended has been settled by the Privy Council in *Hepworth's case*, and that case governs the present one. *Hepworth's case* was twice argued before the Privy Council and the decision ultimately come to was arrived at by a full Court. It is not difficult to discover that the intention of the Legislature was to place both classes of joint-stock companies carrying on business in this colony on the same footing, but the language used has not successfully established that intention. With the ruling of the Privy Council to guide us it is clear that the defendants in this case are entitled to judgment.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Reid & Nephew; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Chief Justice (the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

LANGEMAN V. BROWN. { 1896. Nov. 19th.

Mr. McGregor applied for provisional sentence for £375 and interest, from the 1st August, 1896, at 8 per cent.—Granted.

HURNAN V. RAS.

Mr. Maskew applied for provisional sentence for £72 10s., one year's interest on a mortgage bond, and on a promissory note for £350.—Granted.

BLAYNEY V. LE GRANGE.

Mr. Tredgold applied for a provisional sentence on a promissory note for £95 and interest.—Granted.

ILLIQUID ROLL.

ARDERNE AND CO. V. MOSS.

Mr. Graham applied for provisional judgment for £75 on an account.—Granted.

ADMISSION.

Mr. Benjamin applied for the admission of Gideon Stephanus Cloete, as attorney and notary, the oaths to be taken before the Resident Magistrate of Aliwal North.—Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE MINORS TITTERTON.

Mr. Close applied for authority to the representative of the said minors to sell their shares of certain four lots of landed property at Port Elizabeth, in the estate of the late Thos. W. Titterton, all the major beneficiaries being agreed to sell, and it being to the interest of the minors to sell too, the present time being advantageous for the disposal of real estate.

The Court granted the order in terms of the Master's report.

MARTINUS' EXECUTORS V. MARTINUS.

Mr. Benjamin applied for an order for the personal attachment of the respondent for contempt of Court, committed by him in failing to render to applicant a full and true account of the assets and liabilities of the joint estate of himself and his deceased wife, and neglecting to execute necessary documents for the transfer of the landed property.

The Chief Justice said that the Court granted the order, but authorised stay of execution for a fortnight, as it was quite possible that the respondent might not have received the previous order of the Court, in order that in the meantime there might be some personal communication with the respondent. The Sheriff was authorised to pass transfer of the land mentioned in the notice to the purchaser.

LEWIS V. LAZARUS. { 1896. Nov. 19th. „ 23rd.

Trade mark—Registration—Trade—Name—Interdict.

Where the registration of a trade mark is objected to before the Registrar of Deeds on the ground that it so nearly resembles a mark already in use, but not registered, as to be calculated to deceive, he should decide upon the application, leaving it to the person aggrieved to apply to the Court in terms of the 5th section of Act 22 of 1877.

This was an application upon notice of motion for an order:

(*a*) Restraining the Registrar of Deeds from registering the respondent as the proprietor of the trade mark "The Corps Cigarettes," more fully described in the notice of application for such registration advertised by you in the "Cape of Good Hope Gazette" on the first day of September last past.

(*b*) Interdicting the respondent from in any way using the label or wrapper depicted in the advertisement aforesaid, and from selling cigarettes with such a label thereon, or enclosed in such a wrapper.

(*c*) Compelling the respondent to pay the costs of this application.

The applicant, Henry Aronovsky Lewis, in his affidavit alleged:

1. That I am a cigarette manufacturer carrying on business in Kimberley and Port Elizabeth in this colony.

2. That previous to September, 1893, I manufactured cigarettes which were enclosed in a

wrapper bearing the trade mark "The Noted Camp Cigarettes," but from September, 1893, I have manufactured and sold cigarettes enclosed in a label or wrapper bearing the words "Court Cigarettes." That since December, 1893, cigarettes manufactured by me have been covered by a label or wrapper identically similar to that annexed hereto and marked A.

3. That my cigarettes have become widely known as the Court Cigarettes, and I have a contract with one firm in this colony to take not less than five million cigarettes per annum enclosed in the wrapper at present used by me.

4. That the respondent has by his attorney, G. Montgomery Walker, given notice in the "Cape Government Gazette" of his intention to apply to the Registrar of Deeds for the registration of a label bearing the words "Corps Cigarettes" in design similar to the label at present used by me.

5. That I am informed and verily believe that the respondent has not used or acquired any vested interest or right in and to the label in respect of which he is applying for registration. I annex hereto a copy of the respondent's label marked B.

6. I submit that the said label of the said respondent is a colourable imitation of that used by me, and is calculated to deceive purchasers of cigarettes bearing the label of the respondent into the belief that they are purchasing my cigarettes.

7. That it is my intention to immediately apply to the Registrar of Deeds for the registration of the label used by me as a trade mark in respect of cigarettes manufactured by me.

There was also an affidavit by Edward Ernest Berry to the following effect:

1. I am the manager of the tobacconist business known as the Jetty-street Cigar Box, and have been such for a period of five years.

2. I have seen in the "Government Gazette," of this colony, the label now sought to be registered by the said Podbresky Abraham Lazarus.

3. The said Podbresky Abraham Lazarus has up to recently manufactured cigarettes called "Crown Cigarettes," wrapped in a label exactly similar to the one he now seeks to register with the exception that instead of the word "Crown" he has now put in the word "Corps" in the label he seeks to register.

4. I also know the cigarettes manufactured by Henry A. Lewis, of Kimberley, known as the "Court Cigarettes" and the label for same and I say that such "Court Cigarettes" were known and used among the public, and manufactured by the said Henry A. Lewis, a very considerable time before the said Podbresky Abraham Lazarus manufactured "Crown Cigarettes" or the cigarettes called "Corps" which he now seeks to register.

5. That the "Corps Cigarettes" are quite unknown here amongst dealers, and the public and I have seen none about.

6. The cigarettes manufactured by Henry A. Lewis are widely known amongst the public in Port Elizabeth as "Court Cigarettes," and have a very large sale and are in great demand here.

There were other affidavits in terms similar to the last precedings made by Ernest Chabaud (a traveller for Ernest Ebert & Co., wholesale tobacco merchants and importers, Port Elizabeth), who said that he was daily in tobacconists' shops and amongst dealers in cigarettes at Port Elizabeth; by Carl Ebert (manager for Ebert & Co.); and by C. H. Lucas, who had carried on business at Port Elizabeth as a tobacconist for ten years.

The answering affidavits filed by Podbresky Abraham Lazarus, of Port Elizabeth, cigarette manufacturer, alleged:

1. That I have read the affidavits made in this matter by Henry Aronovsky Lewis, Edward E. Berry, Ernest Chabaud, Carl Ebert, and Charles Henry Lucas.

2. I have carried on the business of a cigarette manufacturer in Port Elizabeth since 1893, and have been engaged in the trade of cigarette making since I was twelve years of age.

3. I annex hereto the cigarette label marked A, referred to in the affidavit of the said Lewis, and say that I had same designed in the early part of the year 1894, and in February of that year, I commenced to use same as labels for the packets containing cigarettes made and sold by me, and continued to do so up to the month of April last, when I noticed an advertisement in the "Government Gazette" dated 10th April, 1896, page 795, giving notice of the intention of Messrs. J. & S. Porilly, of Kimberley, to apply for the registration of a cigarette label bearing the words "The Crown Cigarettes" and somewhat similar in design to the "Crown Cigarette" label, till then and still being used by me I changed the name "Crown" to "Corps" Cigarette and at once made arrangements to have notice published for registration of "Corps Cigarette" label.

4. That in the month of February, 1894, one John Ward printed 18,000 "Crown Cigarette" labels for me, for which I paid him £9 11s., as shown in the receipt hereto annexed marked B, all of which were then used by me as labels for the cigarette packets sold to customers.

5. That during the period from February, 1894, to the end of the year 1895, the quantities of cigarette packets bearing the said "Crown

Cigarette" label averaged about 1,200 packets (each containing ten cigarettes) weekly, sold to business men in Port Elizabeth and all parts of South Africa, including the Orange Free State and Transvaal, and that from the beginning of this year to the month of August last the average quantity bearing the said label, supplied by me to customers in all parts of this colony and adjoining States, including Rhodesia, amounted to 1,700 packets weekly, and since August last I have supplied customers at the rate of 3,000 packets weekly, bearing the same label, and am unable to keep pace with the demand, which is equal to 15,000 packets per week.

6. That the design of the "Crown" and "Corps" Cigarette labels is one suggested to me from similar patterns which I have seen in Berlin, Konigsberg, and Amsterdam; the variation being principally in the number and distribution of the colouring on the labels, some having only two colours.

7. To the best of my knowledge I never saw the "Court Cigarette" label annexed to the affidavit of the said Lewis before the middle of the year 1895.

8. The only label I know of the said Lewis using before the last-mentioned date was a label with the words "Court Cigarette" of buff colour, exactly similar to the cigarette label hereto annexed marked C.

9 That I am informed and verily believe that the said Lewis is not the proprietor of the said "Court Cigarette" label, nor has he acquired any vested ownership therein and am also informed and verily believe that he is merely the manager and agent at Kimberley for Messrs. E. Ebert & Co., of Port Elizabeth, Kimberley, and Cape Town.

10. That the said E. Ebert & Co. are a large firm having the entire control of certain agencies for the sale of the "Court Cigarettes" claimed by Lewis and support various tobacconists, who sell only cigarettes bearing that label, among whom I may mention are the said C. H. Lucas and E. E. Berry.

11. That the said E. Chabaud and E. Ebert are merely employés of E. Ebert & Co., who are the principals and have entire control of the business.

12. That in reference to paragraphs 3 and 4 of the affidavits of the said Berry and E. Ebert, I say that the "Court Cigarette" label of the design of the annexure A to the affidavit of the said Lewis was not used a considerable time before mine, but a label was used by Lewis identical to the label hereto annexed, marked C, referred to in paragraph 8 thereof.

13. That the said Lewis can both read and write, nowithstanding which I notice he has made his mark to his affidavit.

14. That Lewis has never before either verbally or in writing objected to the use by me of the "Crown Cigarette" labels.

15. That the "Corps Cigarette" labels have only just been printed and are waiting the result of the present application.

16. That the statement of the said E. Chabaud that one Bale, a tobacconist in Queen-street, told him that he had sold cigarettes with the "new brand" is untrue, the said Bale having informed me that he has never sold any cigarettes having the "Corps Cigarette" label thereon, and I say that I never sold the same to him or any other person.

17. That the "Crown Cigarette" label used by me as well as the quality of the cigarettes covered with same are widely known in all parts of the Colony and adjoining States as shown in the telegram and letter hereto annexed, marked D, E, and F.

18. That one Nathan Rossensky and Rossensky, produce merchants, informed me that they had known the said "Crown Cigarette" label for some years and signed certificates to that effect, hereto annexed marked G, and H.

There was also an affidavit by Samuel John Bale, of Port Elizabeth, tobacconist, Bernard who stated:

That I know the abovenamed Podbresky Abraham Lazarus. That I have read the statement in the affidavit of Ernest Chabaud of the 1st October, 1896, alleging "that I had informed him (the said Chabaud) that I had been selling the new brand from Lazarus looking exactly like the Court label, and that I had put them among the Court Cigarettes in Lewis labels, and that these were sold the public as Court Cigarettes and people did not know the difference," and say that such statement is not true, as I never gave such information to the said Chabaud, nor have I ever sold any cigarettes bearing the "Corps Cigarette" label, facsimile marked A whereof is hereto annexed, nor bought any of the same from the said Lazarus, nor did I place any cigarettes bearing such last-mentioned label in my window for sale or exhibition to the public.

There was a further affidavit by the respondent Podbresky Abraham Lazarus, of Port Elizabeth, setting forth:

1. That at various times between the latter part of the year 1894 and the month of August last, I have sold to Thomas Tyghe, the late proprietor of the Gold Diggers' Tavern, at Port

Elizabeth, the "Crown Cigarettes" manufactured by me covered with a label identical to the label hereto annexed marked A.

2. That the said Thomas Tyghe admitted to me that he had been selling the said cigarettes covered with the said label during the said period and gave the certificate signed by him, hereto annexed marked B, having the label of the cigarettes therein referred to attached with his name thereon endorsed.

3. That in adopting the "Crown" and "Corps" cigarette labels, I was in no way whatever guided by the pattern and design of the "Court Cigarette" label in question now claimed by the said Lewis, never having at the time of the alleged issue of the "Court Cigarette" seen same, and did not see it until the middle of 1895, but was entirely guided in the pattern and general details of the design by patterns of cigarette labels I had seen in Europe, as already stated in my previous affidavit herein.

4. That about the month of March, 1894, I sold one W. A. Witt, of Port Elizabeth, "Crown Cigarettes" covered with the said label A and in October 1894. sued the said Witt in the Magistrate's Court, Port Elizabeth, for recovery of the purchase price thereof.

Henry Aronovsky Lewis, of Kimberley, the applicant, filed a replying affidavit in the following terms:

1. I have perused the affidavits of the respondent, Samuel John Bale, and others filed in the above matter in support of the respondent's case.

2. That I admit paragraphs 1, 2 and 15 of the affidavit of the said respondent, sworn to on the 24th day of October, 1896.

3. With regard to the allegations contained in paragraphs 4, 5, 16, 17 and 18 I am unable to admit or deny the same, as they are not matters within my knowledge, and similarly paragraphs 1, 2 and 4 of the affidavit sworn to by the respondent on the 28th day of October, 1896.

4. With regard to paragraph 3 of the respondent's first affidavit I deny that I referred in my affidavit in any way to the "Crown" label, and I say further that until these proceedings were commenced I was not aware that the respondent enclosed his cigarettes in wrappers bearing the word "Crown," but only knew the cigarettes manufactured by the respondent by the brand of the "Square Lion."

5. That in the month of November, 1895, I established a branch factory in Port Elizabeth and supervised the manufacture of cigarettes there, for a period of three months, during which time I did not see any cigarettes manufactured by the respondent bearing any brand other than that of the "Square Lion."

6. With regard to paragraph 6 of the respondent's affidavit I say that the label in respect of which I object is a colouredable imitation of the one used by me, as will be seen on comparing the two labels.

7. That with regard to paragraph 15 I would point out that the respondent states upon the label complained of that a gold medal was awarded to him for "Corps Cigarettes" apparently at some exhibition held at Port Alezab, a place to me unknown.

8. That the "Court Cigarette" label was originally issued by me towards the end of the year 1893, and I annex to this affidavit the original designs, marked A and B.

9. With regard to paragraph 7 I say that the "Court Cigarette" label annexed to my first affidavit was widely known throughout the country and more particularly in Port Elizabeth since the beginning of the year 1894.

10. With regard to paragraph 8 I admit that I used a label similar to the annexure C, but that was only temporarily for a period of about two months, whilst the label at present used by me was being prepared.

11. I deny emphatically the allegations contained in paragraph 9. I am the sole proprietor of the "Court Cigarette" label.

12. I admit the allegation contained in paragraph 10 that the said Ebert & Co. are my sole agents for the sale of "Court Cigarettes." The remaining allegations of the said paragraph are not within my knowledge.

13. I do not understand paragraph 11.

14. With regard to paragraph 13 I admit that I could write up to the beginning of this year, but since then I have suffered from a stroke of paralysis which has almost entirely deprived me of the use of my right hand.

15. With regard to paragraph 14 I do not object to the use by the respondent of the words "Crown Cigarettes."

There was an affidavit by William George Millar as follows:

1. I am a tobacconist carrying on business in Cape Town, and have had considerable experience of the cigarette trade for the last ten years.

2. I know the "Court Cigarette" manufactured by H. A. Lewis and have sold same certainly for the last two years if not longer, there is a very good demand for these cigarettes and I sell large quantities daily.

3. The "Court Cigarette" is recognised and sold by the label, such as annexure A.

4. I have examined the labels hereto annexed marked A and B, and consider that the label "The Corps Cigarette" is a decided imitation of "The Court Cigarette" label and is calculated to deceive the public.

5. The "Corps Cigarette" is unknown here.

Mr. Schreiner, Q.C., for the respondent; objects *in limine* to the proceedings in view of section 1 of Act No. 22 of 1877 the trade mark is not *registered* as the Act requires before an interdict can be applied for.

Mr. Searle, Q.C., for the applicants (arguing upon the objection only): It is not the intention of the Act to prevent any person coming into court who had a mark in use. In *Dieterle* v. *Sturk* (6 Sheil. Part III), the trade mark was not registered yet the Court granted an interdict. As to the merits, we object mainly to the use of the trade name "Corps Cigarettes" as being likely to deceive the public as to our trade name "Court Cigarettes," which already has a reputation. The section of the Act quoted does not apply on this point, there is a distinction between name and mark. We don't object to the whole mark—we object chiefly to the name.

The Chief Justice: But the name is a very essential part of the trade mark.

Mr. Searle: Sections 6, 7, 13 of the Regulations of the Registrar of Deeds show who are entitled to object. We have acquired the right to use a trade name, the fact that we have not registered it does not bar us. We have a right to the name and we have applied for the registration.

Mr. Justice Maasdorp: The present objection was not raised in *Dieterle* v. *Sturk*.

Mr. Searle: No. Take the case of the person who hasn't had time to apply—where an outsider suddenly gets in and gives notice to the Registrar of Deeds.

The Chief Justice: The policy of the Act is to get rid of the likelihood of disputes by early registration. As to the definition of trade mark, see definition in Act 12 of 1895, which was later than *Lewis* v. *Holt* (11 Juta, 106) decided in 1894.

Mr. Schreiner: My fundamental objection is based on the distinction between a trade mark and a trade name. The mark is not the property of the user till it is registered. As to the cases, *Mills* v. *Salmon* (4 Searle, 230) was before the Act, it only showed there was before the Act a common law right. Up to the passing of the Act no case is reported, since the Act many cases have been decided. But there is only one which at first sight is against my contention, viz., *Lewis* v. *Holt* (11 Juta, 106). This was in 1894. Except that case the Court has never interfered with any marks unless there has been registration. So in English law, *vide Sebastian, Trade Marks* (p. 8), which shows that before Statute there was a common law right to prevent use. *Sebastian* shows that since 1875 a trade mark can be acquired *only* according to the Statute, *i.e.*, by registration. Our 1877 Act takes that over and is exactly on the English lines. Before the Act a man might have a right without registration. Our Act substitutes the new definite fixed mode of registration for the vague mode of acquiring by user. See *Opinions of Grotius* (Translation by De Bruyn, p. 123), and the Transvaal High Court case of *Rose & Co.* v. *Miller* there dealt with. This is interesting because in Transvaal there is no legislation on the point. Yet it is there held that there is a common law right (as recognised in *Mills* v. *Salmon*). But Parliament now has ordained that the statutory must be the only way of securing the right.

The Chief Justice said: Suppose Lazarus used the words *Lewis* Cigarettes you say there is a remedy for Lewis, this being his own name; but that there would not be if Lazarus actually used the words "Court Cigarettes"?

Mr. Schreiner: There is a right in one's name (see *Combrinck* v. *De Kock*, 5 Juta, 405), which there might not be in a fancy name like 'Court." The Act has nothing to do with a trade name, and a man has a common law right in regard to that; the right to a trade mark is no longer a common law but a statutory one, limited exactly to the Statute (section 5 of Act 22 of 1877).

The Chief Justice: You say then that registration is first and that user is not the question. Then if you were to register "Corps Cigarettes" first you could object to his registering "Court" as a colourable imitation though in use long before you.

Mr. Schreiner: Yes, but in such a case section 6 allows the matter to be referred to the Court, who could give special leave for registration. I have gone through every case and every one application is by a registered person except *Lewis* v. *Holt* and *Combrinck's* cases. The Cape cases are: *Levy Bros.* v. *Goldstein* (6 H.C., Appendix, page 1); *Lewis* v. *Holt & Holt* (11 Juta, 106); *Reiners, Von Laer & Co.* v. *Fehr* (9 Juta, 306); *Franken & Co.* v. *Pope* (11 Juta, 209); *Price's Patent Candle Co.* v. *Everett & Co.* (11 Juta, 213); *Somervil* v. *Cuthbert* (12 Juta, 252); *Martell & Co.* v. *Paarl Wine Co.* (12 Juta, 326).

Mr. Searle: There is no difference in the procedure between this case and that of *Dieterle* v. *Sturk*, only in the latter case the present point was not raised.

The case was adjourned to receive the report of the Registrar of Deeds.

The Chief Justice said: The report of the Registrar of Deeds has been received, from which it appears that he has not refused to register the respondent's proposed trade mark—"Corps Cigarettes"—but that upon the applicant objecting to its registration as being an imitation of his own trade mark—"Court Cigarettes"—the Registrar postponed his decision in order to enable the applicant to apply to this Court for an interdict. In my opinion, however, the Registrar should decide the question himself before relief is sought from this Court. The 1st section of Act 22 of 1877 enacts that no person shall "be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade mark as defined by this Act until and unless such trade mark is registered in pursuance of this Act." The applicant's trade mark is not so registered, his claim resting upon long user quite independently of registration. It is not necessary now to consider to what extent a person who has used but has not registered some trade name is debarred by the 1st section from preventing the use by another of such a trade name in such a manner as to pass his goods off for those of the person who has acquired a reputation in respect of such goods. It is sufficient to say that the section was not intended to relieve the Court of the duty to prevent the perpetration of fraud by rivals in trade. In the present case however the first question to be determined is whether the respondent's proposed trade mark shall be registered or not, and the 5th section of the Act clearly contemplates that such a question shall, in the first instance, be decided by the Registrar. If either party is dissatisfied with the decision of the Registrar, he may under the 5th section apply to the Court. The only cases in which the Registrar can refer the parties to the Court, without deciding the question himself, is where each of several persons claims to be registered as proprietor of the same trade mark, or where it is proposed to register, in respect of the same goods or classes of goods, a trade mark identical with one already on the register with respect to such goods or classes of goods The respondent's trade mark is not the same as the applicant's. The latter has given notice of his intention to apply for the registration of his trade mark "Court Cigarettes." In view of the similarity in the pronunciation of the two proposed trade marks, it would be well for the Registrar not to decide upon the respondent's application until he has had an opportunity of considering that of the applicant. After he has given his decision the matter will be ripe for hearing in this Court. The application for an interdict must be refused, but as the applicant was referred to the Court by the Registrar, the question of costs is reserved.

[Applicant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorney, G. M. Walker.]

VAN DER VYVER V. DEARY.

Mr. Schreiner, Q.C., applied on behalf of the defendant for the appointment of a commission to take the evidence at Aliwal North of certain witnesses for the defence, whose evidence is material, but whose personal attendance in Cape Town would be most inconvenient and expensive.

Mr. Searle, Q.C., for the respondent.

Granted; costs to be costs in the cause. The Resident Magistrate of Aliwal North was appointed commissioner.

IN THE INSOLVENT ESTATE OF JOHANNES M. L. SLEBUSCH.

Mr. Graham applied for an order setting aside the election of Johannes C. van den Heever as sole trustee of the said insolvent estate, on the ground that at the second meeting of creditors he did not obtain the majority of the votes in number and value, and for an order appointing the said Van den Heever and Constantia A. Schweitzer to be joint provisional trustees, with full power to finally liquidate the estate.

Granted; the costs of the application to come out of the estate.

REGINA V. ARMSTRONG. { 1896. Nov. 19th.

Liquor Licensing Act, 1883—Chemist—Medicinal purposes.

If a liquid sold or administered by a chemist be of such a nature that, although it contains spirituous liquor, its ordinary and reasonable use would be only for medicinal purposes it falls within the exemptions of the 2nd section of the Liquor Licensing Act, 1883, unless the chemist knew or had reason to know that it was bought in order to be consumed for its intoxicating qualities.

This was an appeal from the conviction of the appellant by the Resident Magistrate of Queen's Town for contravening Act 28 of 1883, section 75.

The summons alleged that the accused did on or about the 16th day of September, 1896, wrongfully and unlawfully sell, deal in, or

dispose of to one Eliza Holmes, a licensed retailer of spirits, carrying on business at the Masonic Hotel, Queen's Town, certain intoxicating liquors, to wit, six bottles of orange bitters, and six bottles of aromatic quinine bitters for the sum of £1 11s. 6d., the said accused not having taken out a licence as by law required.

The accused pleaded not guilty.

The sale was admitted, and the evidence of Mr. Creed, the Inspector of Licences, who distilled the bitters showed that the aromatic quinine bitters contained 41.2 per cent. of proof spirit and the orange bitters 33·7 per cent. of proof spirit.

Mrs. Holmes, to whom the bitters had been sold by Armstrong, stated, in her evidence for the prosecution, that she did not sell the bitters, that they were consumed with the liquors and aerated waters, by putting a *few drops* into a glass as an *appetizer*. That she never sold the bitters by the wine glass, and that she made no charge for them if drunk in lemonade or other liquor.

She further stated that she did not buy the bitters to retail them in the hotel, and that as far as her experience went, the bitters were only used for tonic purposes, and that she used about one bottle a month in her hotel bar. The barman stated that the bitters were not sold by the glass or by the bottle, and that they were supplied simply as a tonic, by which he meant a medicine, and that he had never known any person take bitters to excess.

The case for the defence was that the bitters were simply tinctures and were sold for medicinal purposes, and not as intoxicating liquors, and that from their nature, being tinctures, they naturally contained a considerable proportion of spirit, which was necessary to extract the medicinal virtues of the drugs used.

The Magistrate found the accused guilty and imposed a fine of £2.

From this sentence the appeal was now brought.

Mr. Schreiner, Q.C., for the appellant: This is an appeal from the conviction of the Resident Magistrate, Queen's Town, under the 75th section of the Liquor Licensing Act of 1883. The grounds of appeal are: (1) The articles sold are not in the category of intoxicating articles the sale of which is forbidden by the Act. (2) They were sold by a chemist—who is exempted by sub-section 2, section 2, of the Act of 1883. (3) That the chemist's true liability would be (if any) that he has not taken out a licence as a compounder under section 2, Act 18 of 1884. We admit he had not taken out a licence yet, though see *Queen* v. *Bell* (sale of ginger brandy—8 E.D.C., 3). The questions are: (*a*) Are bitters (as ordinarily prepared and sold) "intoxicating liquors"? And (*b*) is not a chemist able to sell them even if they are. Act 28 of 1883 intends to limit (by heavy licences) the sale of intoxicating (?) liquor, *i.e.*, beverages which people are in the habit of drinking.

The Chief Justice: Yes, but the schedule carefully points out exceptions, *e.g.* perfumes, or eau-de-Cologne could not be sold.

Mr. Schreiner: But see the Stamp Act of 1887, section 4, which in this connection uses the words "customarily used or sold." This shows that the law recognises certain things as being customarily sold in chemists' shops. Take spirits of wine: people can get intoxicated on this liquid, but they do not generally get it for the purpose of becoming intoxicated. "Bitters" is an intoxicating *liquid* not a liquor. Its use may be perverted. It would have been so easy to put "bitters" in the category of exceptions with "perfumes," &c. if the Legislature intended to except it. The ordinary use of bitters is to put a few drops in other liquors, not to drink as a liquor.

The Chief Justice: If that is correct—why should perfumes (which are not *ordinarily* drunk) be specially excepted?

Mr. Schreiner: They may be especially excepted *ex superabundanti cautela*. The Statute is highly penal—it should not be construed in a very rigid way.

The Chief Justice: The appellant sells twelve bottles to an outside person (not another chemist), is that selling for a medicinal purpose?

Mr. Schreiner: We cannot follow up the articles sold. Sub-section 2 of section 2 of Act 28 of 1883 amply protects the appellant. He has been prosecuted under Act 28 of 1883—he should have been sued for not taking out a compounder's licence. The chemist cannot follow up, and he is not bound to have the articles sold consumed on the premises: so long as he sells for medicinal purposes he is protected. The quantity sold is really immaterial.

Mr. Sheil (Acting Attorney-General) for the Crown: The question is—what is the definition of intoxicating liquor? It is common cause that the substance called "bitters" is liquor of an intoxicating nature, it contains a very large percentage of proof spirit.

The Chief Justice: Yes, like essence of ginger and so on, they are liquids which are of an intoxicating nature, but are not generally taken in quantity.

Mr. Sheil: Yes, but *Queen* v. *Bell* shows that on the chemist lies the *onus* of proving that the

liquor was sold for "medicinal purposes." Here was a case of selling twelve bottles to the hotelkeeper. The appellant clearly did not sell for medicinal purposes.

The Chief Justice: Yes, but the barman shows that the bitters are given away in the liquids sold. Why? To give flavour or for stomachic purposes. If the latter, is it not a medicinal purpose?

Mr. Sheil: Would that be the medicinal purpose contemplated by sub-section 2? Where the substance sold cannot be taken in large quantities it might be medicinal. But the effect of the chemist's evidence ("that I would not give another dose in five minutes") is to show that he does give a larger quantity than the barman does. Whether this is the case or not, how can a chemist, who sells a substance containing a large proportion of spirit to a hotelkeeper, knowing that it was to be consumed in the bar, say that he has sold for a medicinal purpose?

We don't go on the fact that the defendant was not duly licensed as a chemist; he seems to have been under a misapprehension that the licence held by his predecessor covered his dealings. He took out the licence the day after the case. But it would be interesting to decide the matter as a test case for chemists.

Mr. Schreiner: Section 4, Act 15 of 1877, shows what is covered by a chemist's licence. Section 2, Ordinance 9 of 1851, shows what was formerly taken to be "liquor." It is interesting to know that Resident Magistrate, Cape, in the case *Queen* v. *Desvages* held that bitters and spirits of wine can be sold by a chemist.

The Chief Justice said: There can be no doubt that the liquor sold by the appellant was of an intoxicating nature, and therefore subject to the restrictions in regard to its sale of the Liquor Licensing Act, 1883. It contains spirits of great strength, and if taken in sufficient quantity, must certainly be intoxicating. The appellant therefore, who was a chemist and not licensed under the Act, was properly convicted unless he falls within the exemption of the 2nd section, which enacts that "nothing in the Act shall apply to any apothecary, chemist or druggist, who may administer or sell any spirituous, distilled, or fermented liquors for medicinal purposes." The point to be determined is whether the liquid in question was sold for medicinal purposes. It has been said that this is a test case, but there are many mixtures dispensed by chemists in the composition of which alcohol enters, and a decision as to one such liquid is not conclusive as to every other. Some general principle may, however, be laid down for the guidance of Magistrates' Courts in future, and it is briefly this, that if the liquid be of such a nature that its ordinary and reasonable use would be only for medicinal purposes, it falls within the exemption unless the chemist knows or has reason to know that it is bought in order to be consumed for its intoxicating qualities. To illustrate my meaning, let me refer again to tincture of ginger or essence of ginger, as it is sometimes called. It contains a large proportion of spirits, but its ordinary and reasonable use is for medicinal purposes. A drunkard or a madman may take it on account of its intoxicating qualities, and if a chemist were to supply it to a drunkard under circumstances showing that it could only be bought to satisfy the craving for drink, he could not be held to have sold or administered it for medicinal purposes. But in the absence of proof of this nature, he would be held to have sold it for its ordinary and reasonable use as medicine. The ordinary and reasonable use of the liquid now in question is as a tonic. The prosecutor relied mainly on the fact that it had been sold to a hotelkeeper, but the latter, who was called on behalf of the prosecution, explained in his evidence to what purposes it was applied. "I do not," said he, "sell the bitters. They are consumed with the liquors and aerated waters by putting a few drops in a glass as an appetizer. I never sell bitters by the wineglass. I make no charge for the bitters if taken in lemonade or other liquid. I never sell it. As far as my experience goes bitters are only used as an appetizer. At the hotel we used about a bottle a month." On behalf of the appellant two medical doctors stated that the liquid was a tonic to be used in drops, mixed with some other liquid and not as a beverage by itself. Under these circumstances the Magistrate ought not to have convicted the appellant, and the appeal must therefore be allowed.

REGINA V. NOKITSHINI AND DRAYI. — 1896. Nov. 19th. „ 20th.

Liquor Licensing Act, 1883—Principal and agent.

In a prosecution for a contravention of the 75th section of the Liquor Licensing Act, a principal and his agent cannot both be convicted of the same offence.

A principal and his agent having been so convicted in a Magistrate's Court the sentence upon the principal only was confirmed, that upon the agent being quashed.

This was an argument on a question of law reserved by the Eastern Districts Court for the

consideration of the Court of Appeal in Criminal Cases under the provisions of section 20 of Act 35 of 1896.

The two prisoners were convicted by the Resident Magistrate of Peddie of a contravention of section 75, Act 28 of 1883 and were each sentenced to pay a fine of £20, or to be imprisoned with hard labour for three months.

The judge of the week, before whom the case came for review in the ordinary course, upon the strength of the case of *Regina* v. *Willem* (4 H.C., 242) doubted whether he could confirm the sentence upon both the prisoners, and referred the point for argument to the Eastern Districts Court.

When the case came before the Court, it was admitted by counsel on behalf of the prisoners, that there was sufficient evidence to justify the Resident Magistrate in coming to the conclusion that both prisoners had contravened the section, the one acting as principal and the other as agent: but it was argued that the Supreme Court had decided in the two cases referred to in *Regina* v. *Willem*, that only one penalty could be inflicted under this section, and consequently that the sentences upon both prisoners could not stand. As no reports, however, of these two cases could be obtained, the Eastern Districts Court felt some difficulty in acting upon the decision in the case of *Regina* v. *Willem*. The question being one of some importance affecting cases not only under this particular section, but also under other Acts, it reserved for the consideration of the Appeal Court these points: (1) Whether in charges under section 75, Act 28 of 1883, only one penalty can be inflicted, and (2) if so, upon which of the two prisoners the penalty should fall in the present case?

The facts appear sufficiently from the evidence of Private George Booth, which was to the following effect:

I am a private in the Cape Police, stationed at Newcastle, in this division (Peddie).

On the 22nd September, I was sent in company with Private Jeremiah on detective duty. Corporal Campbell marked two coins (a two shilling piece and two separate shillings each); the marks resembled a Roman figure No. III. We went to a hut belonging to one "Ndukwana," residing on Mr. Jim Brent's farm. We found there one "Nokitshini," a native woman. We asked her to sell us some brandy, which she did at once. She told us that she was told by one "Drayi," a native man, her son, that we police, could have liquor, as he was a camp boy of ours.

We bought from "Nokitshini," five half-bottles of brandy, and paid for four bottles, telling her we would pay later on for the fifth one, and the brandy was paid for with the marked coins. We reported the matter to Corporal Campbell, and a search was made at the hut, and the consequence was that the marked coins were found on "Nokitshini." Drayi admitted that he told his mother to sell, and also told us that the brandy was his.

Mr. Buchanan, at the request of the Court, argued the point reserved.

As the Eastern Districts Court before whom the case was argued only reserved the questions whether (1) in charges under section 75 of Act 28 of 1883 only *one* penalty can be inflicted, and (2) if so, upon which prisoner the penalty should fall in their case, it is not open to argue as to whether there was sufficient evidence to convict either or both prisoners; as to whether the relationship of principal and agent did really exist; or as to whether *mens rea* is required to be and is shown against either or both accused to make them liable. Assuming then that the relation of principal and agent is established, and that it is not necessary to go into the question of *mens rea*, can both principal and agent be punished for one and the same act of selling, negotiated by the agent but authorised by the principal? It has been held in the cases of *Queen* v. *Safedien and Another* (not reported but to be found mentioned in "Cape Times," 5th August, 1885) and in *Queen* v. *Thomas and Another* ("Cape Times," August 28 1885), which cases were followed by *Queen* v. *Willem* (4 High Court Reps., 242), that only one of two persons connected as principal and agent can be convicted under section 75. The two former cases were decided by Smith, J., on reviewing the decisions of the Magistrates who had tried the cases. These cases properly interpreted section 75 and other sections of Act 28 of 1883. For a conviction under that part of section 75 applicable to this case, viz. the first clause, the Crown must prove (1) a selling of liquor by an accused and, (2) that accused had no licence. It is not contended that either of the accused in this case had a licence. As to *selling*, this must be judged of according to the common law principles regulating the contract of sale, as section 75 only prohibits and makes penal one species of such sale, viz., sale of liquor without licence, and so the common law principles are not disturbed. So in a civil action on a sale by an authorised agent the purchaser could if the principal was disclosed or afterwards discovered, only bring an action against one person, which would be either the principal or the agent as the circumstances warrant, but not against both. A similar principle would hold even in cases like this of a *quasi* criminal nature. The words

"sell, deal in, or dispose of" in section 75 mean the same thing, all the latter words are only synonyms of the word "sale." There is in this case only one *sale* and only one person is the seller for the purposes of this section, viz., the owner of the brandy and the principal who authorised the sale. If the word "sell" included the act of authorisation of the principal as well as the act of negotiation of the agent, then the Legislature would have said "sell or negotiate the sale" or "sell either as principal or agent" as was done in the Diamond Trade Acts 48 of 1882, sections 3, 5 and 7, and 14 of 1885, section 1. Conversely by Act 32 of 1883, section 3, "buyer" means the principal and not the agent. By various sections of the Act the Legislature has made it clear that whatever may be the ordinary meaning of the word "sell," it only penalised the sale as against the principal. By section 75 itself the words of the second clause, "or sell or offer or expose for sale any such liquors at any place where *he* is not authorised by *his* licence to sell," are directed against the principal, the licence-holder, who may be liable thereon even for the act of his agent, but not such agent, and as the word "or" and not "and" join that clause with the preceding, it is clear that it was contemplated that the first clause was also directed against the principal, who is in the law the seller. Again by the additional penalty laid down by the section, any offender who happens to be a retail shop licence-holder may be adjudged to forfeit his licence, and further, be disqualified from taking out any *other* retail shop licence. This penalty is not directed against the agent of such licence-holder who may actually have sold and thus rendered the principal liable to this additional penalty. By section 77 the *vendor* of gingerbeer, &c., who mixes liquors therewith is deemed to have *sold* the liquor. If "sell" covers the act of both principal and agent, at least *vendor* means only the principal, the owner of the goods who sells either by himself or his agent. The agent is not contemplated in this section, except as binding his principal. Again, by section 84 it is laid down that "in proceedings against any person for *selling or allowing to be sold* liquor without a licence" the presumption is he is not licensed and he must produce his license if he has had it. Now if "sell" includes the acts of both principal and agent, there was no necessity for including the words "allowing to be sold." The section applies only to the principal who sells by himself or his agent. Again, this section provides a legislative interpretation of the words "sell, deal in, or dispose of," because the words "selling or allowing to be sold" are in this section substituted for the words "sell, deal in, or dispose of" of a corresponding section of Ordinance 9 of 1851, section 42, making the same presumption. The remaining part of the section is directed against the owner of the premises on which liquor is sold or at least against the owner of the liquor. Again, sections 87 and 88, providing for a search of premises and confiscation of liquor, show that the penalty is directed against the *owner* of the liquor. Again, by section 94 half the penalty is to go to the informer and the other half *shall* be awarded to the Field-cornet, if he is prosecutor, for his trouble in conducting such prosecution. The Legislature did not intend more than one penalty for one particular sale, as in that case the more principals and agents proceeded against for one particular sale the larger would be prosecutor's fees, though the reason for the payment, the trouble of prosecuting, was not proportionately increased. By section 50 of Ordinance 9 of 1851 the whole penalty went to the informer. But the strongest section is section 95, which provides that execution may be levied against all goods found on the premises where the illegal sale took place whether they belong to offender or not, with certain exceptions. This shows that the penalty was levelled against the owner of the house or of the liquor. If a penalty could be imposed on both principal and agent for one and the same sale, then the levy could be made in case of nonpayment of fine on the principal's goods in the house for both penalties and so the principal would be *twice* punished. If the Court holds that both accused can be convicted, then there remains the argument that only one penalty is exigible for a joint and single act such as this, done by many parties. *Queen* v. *Willem* (4 High Court Rep., 242); *Regina* v. *Clarke* (1 Cowp. Rep., 610); *Garrett* v. *Messenger* (L.R. 2, C.P., 583). Though this argument has been advanced and accepted in these cases it is difficult to see the reason of it, and as *Maxwell on the Interpretation of Statutes* (p. 273, third edition) says the question as to whether the offence was a joint one or several arose not from the nature of the offence but from the nature of the penalty, it being in these cases a pecuniary penalty and not imprisonment or lashes, which it would have been impossible to apportion between two or more joint offenders. In that case the greater the number of offenders involved the less punishment would each receive.

The Chief Justice: If the principal is the one to be penalised, how if he is out of the Colony? There is no section in the Act similar to section 11 of Act 44 of 1885 making the

manager of a licensed dealer responsible as well as the dealer himself.

Mr. Sheil (Acting Attorney-General) for the Crown: If the offence is joint only one penalty can be inflicted, if several, every person is liable. *Maxwell on Interpretation of Statutes* (p. 238). If there is only one penalty it must be ascertained whether it is one for the offence or one for the offender. In *Queen* v. *Willem* the judge simply followed *Queen* v. *Safodien* and *Queen* v. *Thomas*, but the present case is clearly distinguished from these; apparently in these cases both the parties were not concerned in the selling.

The Chief Justice: Oh yes they were.

Mr. Sheil: The reports are not clear on the point. See also *Queen* v. *Farley* (2 J., 227). If it is the offence and not the offender that is visited with punishment by the Statute only one penalty is incurred, however large may be the number of persons who incurred it. In the present case the Act is clearly directed against the offender, and if there are more than one each is liable as in the case of partners. See *Regina* v. *Dean* (12 M. & W. 140).

Mr. Buchanan in reply.

The Chief Justice said: In the two cases cited I was party to the decision, although the judgments were delivered by Mr. Justice Smith, before whom the cases had come in review as judge of the week. I quite adhere to the decisions, but I am not prepared to express any opinion upon the further question which has been raised whether two or more partners in trade can be convicted of a contravention of the 75th section of the Liquor Licensing Act, 1883. The only question which arose in the two previous cases and which arises in the present case is whether a principal and agent can both be convicted of the offence. Drayi was the principal and Nokitshini was his agent in the illicit sale of the brandy, and both were convicted and sentenced. Drayi was not present when the brandy was sold, but the sale took place by his directions. He clearly, therefore, was guilty and the sentence passed on him must be confirmed. As to his agent, however, I am of opinion that the conviction cannot also stand. Besides other indications of the intention of the Legislature, I need only refer to the 95th section of the Act, which enacts that for the purpose of levying any penalty imposed under the Act execution may be levied upon all goods and chattels found on the premises. If the double conviction were allowed the principal would in most cases be mulcted in double the penalty allowed by law, for he would not only have to pay his own fine but be liable to have the fine which has been imposed on his agent levied on his own goods and chattels. The sentence passed on the female prisoner must be quashed.

Mr. Justice Buchanan said: I concur, but I think that the decision should be limited specially to the facts in the case, and should not be extended beyond the facts of the present case.

Mr. Justice Maasdorp concurred.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

HELM V. HELM. { 1896. Nov. 20th.

This was an action for divorce brought by the husband on the ground of the defendant's adultery.

Mr. Graham appeared for the plaintiff; defendant in default.

Mr. R. D. H. Barry, clerk in charge of the marriage register, produced the register of the marriage, which took place in November, 1894.

Gert Christoffel Helm said when he was married he worked on the Government telegraphs. He was married at Prince Albert, but the day after the wedding he went to Worcester. Two days afterwards he was ordered off to Prieska suddenly, and left his wife behind him. He stayed there three months, and while there sent his wife £4 every month. He asked his wife to come up to him but she would not, and he resigned the service and came back to Worcester. He found that she had been committing adultery, and she confessed it and left him. He had since worked in Johannesburg.

Plaintiff's mother gave evidence that she found a man named Petersen in her daughter-in-law's room one night in February, 1895. Defendant asked her forgiveness, and she promised not to tell her son. When her son came back he soon found out, and then his wife left.

Jan Zoa gave evidence as to seeing Petersen come out of defendant's bedroom at two o'clock one morning in February, when he was seized by defendant's mother-in-law, but after a scuffle

escaped, leaving his boot behind him. He said the boot was his when it was given to him next day.

A decree of divorce was granted, and the Court declared defendant to have forfeited all share of the benefits under the community.

[Plaintiff's Attorney, C. C. Silberbauer.]

COOMER V. WESNER.

This was an action to obtain transfer of certain land at Claremont in the Cape Division, purchased from defendant, together with £100 damages.

Plaintiff's declaration set forth:

1. The plaintiff is Frederick Charles Coomer, who resides at Claremont; the defendant is Carl Fredrich Wilhelm Wesner, residing on the Cape Flats, in the Cape Division.

2. The defendant is, and was, at the dates hereinafter referred to, the registered owner of certain land situated upon the Lansdowne-road, Claremont.

3. On or about August 15, 1896, the defendant gave to the plaintiff the refusal or option to purchase certain land belonging to the defendant on the Lansdowne-road, Claremont, being portion of the Romp Vallei, at the sum of £12 10s. sterling per acre. the extent being about eighty acres, the purchaser to pay all expenses of survey and transfer.

4. Thereafter in the said month of August it was further agreed between the plaintiff and defendant that survey should be made at plaintiff's expense, in order that the extent of a portion of the said land as to which plaintiff was desirous of exercising the said right of option should be ascertained. The boundaries of the portion of land which the plaintiff was willing to purchase, were at the said date pointed out and agreed to by the defendant.

5. Thereafter the plaintiff exercised the said option as to sixty-two acres, more or less, being the portion defined by the said boundaries and agreed to be surveyed as aforesaid, and confirmed the said purchase and sale thereof.

6. The portion of land referred to has been duly surveyed, and the actual extent of the land sold and purchased as aforesaid amounts to twenty-nine morgen and two hundred and seventy-two square roods, and the price thereof according to the above agreement is the sum of £780.

7. The plaintiff has demanded transfer of the said land and has tendered to defendant the purchase price thereof and costs of transfer, but defendant neglects and refuses to pass transfer of the said land.

8. By the said neglect and refusal plaintiff has sustained damages in the sum of £100 sterling.

The plaintiff claims:

(*a*) An order upon the defendant to take the necessary steps to pass transfer to the plaintiff of the said land, tendering the purchase price. to wit £780, and costs of transfer.

(*b*) £100 damages as aforesaid.

(*c*) Alternative relief.

(*d*) Costs of suit.

For a plea to the declaration, the defendant said:

1. He admits the allegations in the 1st, 2nd, 3rd and 4th paragraphs of the declaration, but he says specially that it was agreed between the parties that any option of purchase in favour of the plaintiff should be confined to the land within the boundaries pointed out by the defendant in the month of August, as aforesaid; the plaintiff gave no consideration for or in return for the said option.

2. As to the 5th paragraph. he says that on the 1st September, 1896. the plaintiff gave him notice that he desired to exercise his option and to purchase a certain portion of the said ground, being 62 acres in extent more or less, but he denies that the said portion was the exact portion confined within the boundaries pointed out as aforesaid.

3. The defendant thereupon informed the plaintiff, as was the fact, that the ground which the plaintiff desired to purchase was larger in extent then the portion defined within the boundaries aforesaid. and that he was unwilling to agree to the sale of such larger extent, but would sell to the plaintiff the portion of ground defined as aforesaid.

4. The defendant has always been and still is willing to confirm the sale of the ground defined as aforesaid, and has offered to transfer to him the said piece of ground after survey upon payment by the plaintiff of the price of £12 10s. per acre and all expenses, but the plaintiff is unwilling to accept the said offer.

5. As to the 6th paragraph, he says that the land therein referred to as measuring 29 morgen and 72 square roods includes certain land which was not included within the boundaries pointed out in the month of August as aforesaid.

6. Subject to the above he admits the 7th paragraph but he denies all the allegations in the 8th paragraph of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Mr. Searle, Q.C. (with whom was Mr. Tredgold), appeared for the plaintiff.

Mr. Innes, Q.C. (with whom was Mr. Graham), for the defendant.

Frederick Charles Coomer, of the Lansdowne Hotel, Claremont, the plaintiff, said he had negotiations with Wesner as to the sale of certain land, and on August 15, Wesner signed a document giving him the refusal of all his ground on the Lansdowne-road, Romp Vallei portion, at £12 10s. per acre, purchaser to pay all transfer and survey charges. The land referred to was considered to be about eighty acres on the right-hand side of the road going down. Romp Vallei extended on both sides of the road. On August 21 he and defendant and Mr. Smuts, the surveyor, met on the ground, and they visited the various beacons on the ground, which were made of masonwork, except one, which was a pole. To prevent a too great number of beacons, one was put up at point A, which cut off defendant's ground on the other side from Lansdowne-road by a narrow strip of 30 feet at the widest part. He said to defendant, "You are making me pay for a hard road," to which defendant said it was only a narrow strip and of no importance.

By the Court: He was not now willing that the Lansdowne-road should be the boundary of the land he had to receive from defendant.

Witness (continuing) said that a little later he made other negotiations with defendant for the purchase of more land, but then defendant refused to sell any of the land, as he said the beacons were wrong. Witness would not agree to a fresh survey being made at his expense, and defendant then refused to have any further transactions with him. By a plan which defendant now said showed the boundaries of the land sold, the road formed the boundary of the ground that Wesner had sold him. He was not willing to accept defendant's plan.

Cross-examined: On the land sold, the Lansdowne-road took a turn. Defendant had not said that the road from point B to the turn should be the boundary, and then that the line should run from the turn to point A. He had not at first intended to go on the other side of the road at all, but now he would not take the road as his boundary. At first his only objection to altering the agreement and accepting the road as his boundary was the expense of a new survey and diagrams, but now, after all the worry and bother, he preferred to stick to the line as given by the surveyor. In addition to that, the strip on the other side of the road, though only 30 feet at its widest part, might be very valuable in time.

By the Court: He at first thought his land would just fall within the edge of the road. He supposed defendant was selling him the road, and had objected, but defendant insisted on the line A B marking the boundary, and he had to consent.

Martin E. Smuts, Government land surveyor, described what passed at the time of the survey when he and the two parties were present. He had suggested that the middle of the Lansdowne-road be the boundary, but Wesner took a spot for a beacon 30 feet from the road, and said a straight line from that point to the southern beacon B should be taken, the line being one putting all the road and a little portion of land on the other side as that to be bought by Coomer. Wesner might have thought that the line he had taken ran along the edge of the road. He surveyed the land that same afternoon, and completed the calculations, and handed the result in to Coomer's agent before the end of August. The quantity of land surveyed amounted to 62·4 acres.

Cross-examined: There was a pole in the road near where Wesner fixed the point A from which the straight line ran down to B at the other end of the road. Witness suggested that the pole be taken as the beacon, and he judged that a line from that pole to B would run down the centre of the road. He believed that Wesner intended that the line he took should skirt along the west side of the road, though as a matter of fact it only just touched the ditch at the roadside at one place.

By the Court: A man looking from point A to point B could scarcely tell that a line between the points would not run along the edge of the road. He himself thought it would run along the road more or less, though leaving it some distance before reaching point B.

C. F. W. Wesner, of Turf Hall, Claremont Flats, the defendant, said that his residence was on the east of Lansdowne-road. He owned land on both sides of the road, but that on the west was called Romp Vallei. He was willing to sell land on the west of the Lansdowne-road, and when Coomer asked him he gave him the option to take the land at £12 10s. per acre. When Coomer and he met the land surveyor on the ground he intended that practically the whole road would fall outside the land he was selling to Coomer. He had taken the point A 30 feet outside the road, so as to make a straight line from B, such a line to run up the road until the road made the bend near to A. When Coomer a few days later claimed land on the east side of the road near point B he denied having ever sold him any, and was surprised when he said that the surveyor's plans showed that he had sold the land to Coomer. He went straight to Smuts, and remonstrated with him.

Cross-examined: He was certain that he told the surveyor to take a line from A to the road where the bend was, and there to cross the road, and carry the line down the edge of the road from there. He had not fixed beacons at the spots where the line was to cross the road, though he had fixed a pole at A.

After Mr. Searle addressed the Court,

Mr. Innes was not called upon.

The Chief Justice said: I am quite satisfied from the evidence that the original intention of both parties was that only the land on the west side of Lansdowne-road should be sold. A somewhat one-sided agreement was obtained from defendant by plaintiff agreeing to give plaintiff the refusal of all his land on the Lansdowne-road, Claremont, near Romp Vallei, for £12 10s. per acre, the area being about eighty acres, purchaser to pay all expenses of survey and transfer. The agreement was one-sided, binding the defendant on one hand, whilst there was nothing binding on Coomer, nor did Coomer give any consideration for the option. Defendant was prepared to abide by this option which he had given to the plaintiff, and the parties arranged to come together on August 23 for the purpose of pointing out the boundaries. Although the road was understood to be one of the boundaries, it is important to observe that it would still be necessary for the parties to go together over the ground, for the boundaries had still to be pointed out on the western side. For that purpose the parties came together, and when the other boundaries had been pointed out, the parties went to the point B at the road and then went towards point A at the other end of the road. It is as to what took place in the neighbourhood of point A that the real dispute took place. In my opinion, at this time it was clearly understood by both plaintiff and defendant that there was to be no departure from the original option. It was only in the first instance, at the surveyor's suggestion that there should be a straight line, that a change was made. Then the defendant proposed that instead of the road being taken as the boundary, the parties should go about 30 feet away from the road and there fix a point as a beacon. Both plaintiff and Mr. Smuts are positive that the line A B was pointed out as the boundary on the eastern side. On the other hand, defendant swears positively that nothing of the kind was said. The impression on my mind is that there was a complete misunderstanding. I certainly am not prepared to go the length that Mr. Searle contends we are bound to do if we do not find for the plaintiff, viz., that either there was actual perjury or wilful falsehood on the part of any of the witnesses. I think that there was a misunderstanding, and that Mr. Wesner never understood the conversation. He does not understand English very well or speak it very well, and that was how the misunderstanding arose. I think that Mr. Wesner understood that there was to be a line from point A to the bend in the road, and then that the road should be followed. Mr. Wesner goes further, and says that he understood that the line was to cross the road at the bend. If there was this misunderstanding it lies with the plaintiff to prove that any portion of this land was to go beyond the road. He has proved it to the extent of that corner—that triangle near point A, and he is entitled to that amount, and only that. It is, therefore, impossible on the form of the declaration for the Court to give judgment for the plaintiff, because he claims transfer in accordance with the diagram. The only course left for the Court is to give absolution from the instance with costs, it being clearly understood that the defendant, to save further litigation, is prepared to give transfer of the portion marked on his plan on payment at the rate of £12 10s. per acre.

Mr. Searle contended that the misunderstanding being mutual, plaintiff should not be cast in the whole costs.

The Chief Justice: Plaintiff must prove his claim.

Mr. Searle said that it was hard on the plaintiff, who had acted *bona fide*.

The Chief Justice: That is a point I don't want to say much about. Plaintiff has made a very good bargain. He wanted his pound of flesh by claiming this strip on the other side of the road. He must now be satisfied.

Mr. Innes asked, and was allowed, defendant's witness expenses.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorney, C. C. Silberbauer.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

FEBRUARY V. BRANDON KIRBY AND CO. } 1896. Nov. 23rd. „ 24th.

Injury - Negligence - Trespass.

K. & Co., *who were drainage contractors, made excavations in a lane adjoining* F.'s *house, and in the course of the work undermined and exposed the foundations of* F.'s *house.*

F. *sued for damages, alleging that the work had been performed in a negligent manner.*

The boundary line of F.'s *property extended some inches into the lane, whilst the excavations extended right up to the foundation walls, thus coming into* F.'s *area.*

The Court held that *the defendants were negligent in allowing the work to be performed under the supervision of an incompetent foreman, and in excavating within the plaintiff's area in the way they had done, and gave damages against the defendants.*

This was an action instituted by Moos February against Brandon Kirby and Samuel Henry Marks (trading under the style or firm of Brandon Kirby and Company), to recover £80 as damages for injuries caused to certain premises belonging to plaintiff through excavations for drainage purposes made by defendants.

The plaintiff's declaration alleged:

1. The plaintiff is a mason residing in Cape Town. The defendants are contractors residing and carrying on business in Cape Town.

2. During the month of February, 1896, the defendants, who are contractors for certain works in connection with the drainage of Cape Town, made certain excavations in a lane adjoining the plaintiff's house, situated in Jordaan-street, Cape Town, for the purpose of laying down certain pipes and for making a man hole.

3. The said excavations so made by the said defendants were made in a negligent and unskilful manner, and in the course of the said work the defendants undermined and exposed the foundations of the plaintiff's house, and in consequence of the said wrongful, unskilful, and negligent acts of the defendants, the plaintiff has sustained damage in the sum of £80.

4. All things have happened, all times have elapsed, and all conditions fulfilled to entitle the plaintiff to demand the sum of £80 for damages to his said house as aforesaid, but the defendants wrongfully refuse to pay the said sum of £80 or any portion thereof.

The plaintiff prays:

(*a*) For damages in the said sum of £80 as aforesaid.

(*b*) Alternative relief.

(*c*) Costs of suit.

For a plea to the declaration the defendant said:

1. They admit the allegations in paragraph 1.

2. As to the allegations in paragraphs 2 and 3, they say that they contracted in or about February, 1896, with one Miss Van der Riet, the owner of certain landed property in the neighbourhood of plaintiff's property, to effect certain drainage works upon her property.

3. The defendants executed the above work upon the said property in a proper and skilful manner, in accordance with plans approved of by the Town Council of Cape Town, and caused no damage to the plaintiff thereby: save as above, they deny the allegations in the said paragraphs.

4. They deny the allegations in paragraph 4, save that they admit that they refuse to pay to the plaintiff any sum of money.

Wherefore they pray that the plaintiff's claim may be dismissed with costs.

The replication was general.

Upon these pleadings issue was joined.

Mr. Graham appeared for the plaintiff; Mr. Searle, Q.C. (with whom was Mr. Tredgold), for the defendants.

Moos February, the plaintiff, a gardener, said he lived in Jordaan-street, Cape Town. He remembered in February last excavations being made near his house in Jordaan-lane by defendants' men. He saw his house built. The foundations approached within 4 inches of his boundary. They were 18 inch foundations. Before the defendants' excavations were made two pipes were laid in the lane, one in the middle and one on the other side of the lane. He noticed when defendants' excavations were made that the hole went under the foundations of his house, exposing the foundations. The hole was on this side of the lane. The pipe which was formerly in the middle of the lane was taken up. He went to the contractor, Mr. Marks, one of the defendant firm, who said the work was all right, and if witness stopped the

workmen again he would make him pay £5. He saw an agent, who wrote to defendants telling them to stop, and proceedings followed in the Supreme Court. A rule *nisi* was given, not to operate as an interdict, but the work was continued, and the holes were finally filled in. Before the excavations there were no cracks in the house walls, but now there were several.

By the Court: The excavations began against his foundations, and the bottom was some distance under the foundations.

Cross-examined: His principal complaint had been against the erection of a manhole in front of his property. It still existed and just in the same place as originally constructed. The lane was steep. There were no cracks in the foundations running parallel with the lane, but there were cracks in the wall above the foundations. There were also cracks on the walls on the other side of the house, but not so many, although it was the weather side. A cross wall running at right angles from the lane was cracked close to the outside wall. The crack had been plastered, but the cement had since cracked. The whole matter could have been settled for £5 if Marks had put a few casks of cement in the excavations and prevented his foundations sinking.

Henry Carter, builder, Cape Town, former owner of Miss Van Riet's property on the other side of Jordaan-lane, said the lane was 60 ft. long and 8 feet wide. He remembered in February last a number of labourers digging up the lane close to plaintiff's property. One man got underneath plaintiff's foundations. He told the labourers they would have the wall down on top of them, and then they took a piece of board and used it to shore up the wall. The old pipe was not taken up. Later the pipes were laid close to plaintiff's foundations, but afterwards they were dug up and laid near the centre. The ground was stiff clay, and good to build upon. Since the excavations the side wall had settled. There was a crack between the side wall and the cross wall. He thought the wall would go on settling unless the excavations were taken out again and filled in with concrete, which would cost between £30 and £40.

Cross-examined: He had not examined the foundations, but he did not notice a crack in them. The plaster of the wall was bulging, and would eventually fall off. It was cracked in many places. Before the excavations there were no cracks in the plaster of the wall. The crack between the side wall and the cross wall was close in the angle. The excavations had not been begun at the branch from the main. The branch had only been brought to the kerb. There was no connection to the main when the pipes were laid on a Saturday in February.

Edward Daniel Catlin, bricklayer, said he had visited plaintiff's house when the excavations were going on, and saw that they were three inches under the footings of plaintiff's house. The pipes were lying in the trench partially covered, and he saw that they were close to the foundations. Afterwards he saw that the pipes had been laid in the centre of the lane. Even now, with the work finished, if there were nine inches of brickwork round the manhole, it would go an inch under plaintiff's building. He had seen a crack in the wall of the house, which he judged was caused by the wall sinking because of the excavations.

Cross-examined: He had formerly been employed by the defendants, but had left at a moment's notice.

David Hagar, an "all-round mason," said he had built the first portion of the house, halfway up. He had seen the excavations going on. They were made alongside the wall—cut straight down from the foundations. Moos February was his stepfather. He had seen no cracks before the excavation, but since then he had seen cracks, which were getting bigger.

Moos February, jun., said he had lived in the house when the excavations were made. They had undermined the foundations. Cracks had begun to be seen in the house since the excavations. There were none there before.

Cross-examined: It was not true according to his depositions that he had seen the drain-pipes covered up.

Francis Murray, builder and contractor, said he had visited the house on March 13 and found three recent cracks. Internally there was a severe crack in the partition wall dividing the two rooms. On March 21 he put gauges of cement on the cracks which a month later had cracked, showing that subsidence was taking place. He had taken levels in the lane on March 21, and a month ago he found that a settlement of two inches had taken place. The excavations would have caused the cracks in the walls.

Cross-examined: There were cracks in the foundation, visible in the lane on March 13, and still visible. There were five cracks. There were cracks on the wall on the other side of the house, but not very serious. There had been little settlement of the land round the foundations, but he thought that the wall had slid slightly outwards towards the trench. There was a slight bulge in the wall which proved it,

By the Court: A house which had been built for three years ought not to crack as that had done. Any laying of pipes to the depth of those in question in that lane, however carefully filled in afterwards, unless with concrete, might cause such cracks.

Robert Esdon, engineer to the Sea Point Municipality, said he had visited the house two months ago and found five cracks in the gable wall in the lane, and an internal crack, which showed the gable and partition walls to be parting. The working plan of the Cape Town Council, by which the pipes were supposed to have been laid, did not show the present position of the drains. By that plan it had been intended that the drain should not be more than 2 feet deep, which would have been amply sufficient.

Cross-examined: If the drain had been well laid the gradient would have been hastened at the sewer. It was a reckless thing to make a trench 4 feet 6 inches deep all alongside the gable. The excavation being too near the wall had caused the gable to slide. Any excavation in that narrow lane would have caused danger to the house. One of the cracks ran down to the ground.

By the Court: One of the cracks on the other side of the house might have been caused by a slight settlement.

Re-examined: A fall ten times more than was necessary by the Municipal regulations could have been got for the drain in the lane without interfering with the man's house.

The Chief Justice: But what could be their object for all the unnecessary digging? It only meant extra expense.

Witness: Yes; but Miss Van Riet would have to pay.

Continuing, witness said he thought he could make the house safe for £20.

Johannes Albertus Vixseboxse, architect, Cape Town, said he had visited the house a week ago. The cracks outside were chiefly plaster cracks, but two went through the foundations. One of the cracks in the partition wall showed that the gable was sliding towards the lane. In two works which he had done the Town Council had made him lay his drains with a hastened fall at the sewer outlet.

Cross-examined: He could not tell what was the present practice of the Town Council. They changed their minds every day. The wall bulged about three-eighths of an inch.

For the defence,

Samuel Herbert Marks, of the firm of Brandon, Kirby & Co., sanitary engineers, said they were doing the excavating for the Municipality of Cape Town. They had contracted to make a drain for Miss Van Riet. Mr. Phillips, sanitary inspector of the Town Council, had inspected the work as it was being done. There was a drain laid in the lane before they began the work. The Town Council would not allow them to make more than one gradient in a drain. The cutting was 21 or 22 inches wide, and the drain was laid within about 2 inches of the centre. The cutting was about 8 or 9 inches from plaintiff's house wall. It was quite untrue that the pipes had been laid close to the wall, and then taken up again. The work in the lane was finished before the rule of Court was served. The inspection chamber was 2 feet long and 14 inches wide. There was 4½-inch brickwork on plaintiff's side, and 9 inches on Miss Van Riet's side.

Cross-examined: They had followed the plan of the Town Council as far as possible. The plan showed the pipe from the main sewer on one side of the middle of the lane, though really it was a little on the other side. Nobody had ever complained to him that his pipes were being laid close to plaintiff's foundations. They began near the manhole, and tried to do without taking up the old pipes in the middle of the lane but could not, so they took them up as they went along. The pipe in the manhole was quite in the centre.

By the Court: It was quite impossible for the excavations to be made close to the foundation without his seeing it.

Henry Edward Arthur Ford, formerly employed by defendant Marks, said he was foreman at the work in Jordaan-lane. He had to attend to work going on on the other side of the road as well. The excavation never got nearer than eight or nine inches from plaintiff's foundations. The pipes were only laid once. They were not laid and then taken up and relaid.

Cross-examined: They worked close to a pipe on Miss Van Riet's side, and in between the two pipes which were already in the lane.

By the Court: There were two pipes in the lane before they began excavating, one on each side of the lane. The hole was made between the pipes.

William White Phillips, assistant drainage inspector of the Cape Town Council, said it was his duty to inspect the work in question, which was completed about February 27. The pipes were laid perfectly straight between one inspection chamber and the other. He was present at the work every day. There was no laying, taking up, or relaying of the pipes. There was a uniform gradient from one chamber to the other, which was the usual rule of the Town Council.

Cross-examined: He was inspecting between thirty and forty jobs at the same time. He did not remember that the work differed from the plan, which provided that the drain should be laid on one side of the lane whereas it was laid on the other. He considered that in ground of such a stiff, clayey character, the excavation would have been perfectly safe if it had gone 5 feet 6 inches deep. He could not remember much about the work as he had so many similar jobs in hand, and it was now a long time ago.

Jim Piers Russell, building inspector of the Town Council, said he had examined the wall in question and found the plaster cracked. The plinth of rubble masonry was, he found, sound. He had broken away a piece of plaster and could not find a crack in the brickwork of the wall. The partition wall was cracked at both ends. He could not say that the wall was not quite sound. It was plumb, except that there was a little bulge owing to the loose plaster. He had visited the house twice at dates seven months apart, and the condition of the wall was the same on both dates. He had noticed cement gauges on the wall, and they were intact five days ago.

Cross-examined: A house ought to settle after the first winter. If cracks appeared for the first time after the house had been three years built, he would look for an excavation as being the cause. Why he did not attribute those cracks on the lane side gable to the excavation, was that there was a similar crack on the other side wall.

John Jenkinson, contractor and builder, said that on April 17 he had examined the wall in question alongside the lane. He found five plaster cracks which started about six inches above the plinth of the foundation. Inside, the plaster had also lost its key. The cross wall in the front room was cracked about 9 inches from the gable wall. The cracks were due to a settlement of the building, due possibly to the excavation or to the ordinary settlement of the building. If it had been due to excavation there would have been cracks in the outside wall. He did not think the building had been damaged by the excavation. There were five cement gauges or tell-tales on the cracks, and two had broken, but the crack had been slight.

Cross-examined: A house built on clay he would expect to crack, even after twenty years, because clay was so susceptible to wet.

The Court expressed the hope that a competent witness from each side would inspect the wall and give their opinions to the Court.

(November 24th.)

Andrew Laird, builder, Cape Town, said he had examined the building in April last with Mr. Jenkinson. He could not say whether there was a settlement of the foundations. He did not think the wall was in a dangerous condition. From the cracks which he saw in the partition wall he would have thought that the foundations had gone outwards. Between April and last week, when he had seen the place again, there seemed to have been no change. He did not think the excavation in the lane had caused injury to the house.

Andries, one of the labourers employed in the excavations, said they had left eight inches of ground outside the foundations. The pipes had never been laid and then taken up and relaid.

Cross-examined: Plaintiff had never told him that they were endangering his foundations. He never saw Carter there until after the pipes were covered. They never shored up the hole with a board. The hole they had dug was more on Miss Van Riet's side of the lane.

By the Court: Plaintiff was satisfied with the work.

Mr. Vixseboxse (recalled) said he had inspected the house again that morning, and had removed plaster in six places from the wall in the lane. Three places out of the six showed cracks in the gable wall near the partition wall. On the other gable wall there was only one brick broken—no cracks. The skirting-board was also cracked. The plaster and brickwork were good for that class of building.

Cross-examined: The cracks over the window in the other gable were worse cracks in appearance, but were such as were found in eighty houses out of a hundred. The cracks were still in the foundation. He did not show Mr. Jenkinson the cracks because he did not think it his duty.

Mr. Jenkinson (who was with Mr. Vixseboxse): They had found the first crack 11 feet up the lane, three bricks cracked; at 13 feet there were a few bricks cracked, and at 15 feet there were a few bricks cracked. At 23 feet there were no bricks cracked. At two places —6 feet and 8 feet—up the lane there were no cracks. The most serious crack was in the other gable under the window. He told Mr. Vixseboxse there were no cracks in the foundation, and the reply was, "They exist," but Mr. Vixseboxse did not show them,

The Chief Justice: I suppose you are confirmed in the evidence you gave yesterday?

Witness: I am.

The Chief Justice: And Mr. Vixseboxse is also confirmed.

Plaintiff (recalled) said he had first seen the excavations on the Tuesday afternoon. Mr. Shaw,

his agent, saw the excavation on Saturday, and on Sunday gave him a letter for Mr. Marks which he delivered on the Monday morning. He showed Marks the foundations all exposed that same Monday morning. His daughter was present at the time.

Defendant Marks (recalled) said he had seen the plaintiff, after receiving Shaw's letter, at the lane. The excavation was then nearly all filled in.

Mr. W. B. Shaw said he wrote a letter in accordance with plaintiff's instructions to defendant. He believed he wrote it on Saturday, February 22. He sent it on Sunday by plaintiff's son. He dated it February 21. He was sure he did not write it on Sunday, but he could not explain why he did not date it on the day he wrote it. He visited the lane on Saturday, February 22, and saw the excavation. It went up the lane a distance of 12 feet, and was close to plaintiff's house foundations, exposing the stones of the foundations, and going down a distance of 5 feet. He told plaintiff to resist any further digging. Pipes were laid in the bottom of the excavation, laid loosely, and not jointed.

Dina February, plaintiff's daughter-in-law, said she saw Marks come to the lane and see her father, and he told her father to keep his tongue. Her father told Marks to see how near his men were digging to the house, and he replied that if he did not shut up it would cost him £5. Her father said better £5 than £100. She had never been in the lane to see the excavations, and had never looked at them from the stoep.

After argument,

The Chief Justice said: In this case there is unfortunately a direct conflict of evidence, and it is impossible for the Court to give judgment for one side without discrediting some of the witnesses on the other side. It is an unpleasant and difficult duty to perform. But the Court not having the assistance of a jury to decide upon questions of fact is bound to perform that duty to the best of its ability. Really, the dispute in this case is whether the excavation ran within the plaintiff's boundary. Plaintiff says his building was so built as to leave about 4 inches of his boundary beyond the foundations, and four of the witnesses state positively that the excavation which was made for the purpose of laying this drain-pipe reached the foundation and went to a depth of 4 feet 6 inches, and continued thus for a length of 12 feet. There is positive evidence of this. These people swear positively of what they have seen, and the manner in which they gave evidence was not such as to prejudice the Court against them. On behalf of the defendants, a number of witnesses said they did not see such an excavation as described. One swears positively that it could not have been made because he was always present. The other witnesses were not always present. Marks was there several times a day, but was not continually there. Ford had another job to attend to, but he struck me as such a foolish kind of young man that one job would have been amply sufficient, and the probabilities are that that job he would do very imperfectly. That was the manner in which he impressed me. He was not the kind of man to have been employed as a foreman in a work of that kind. The impression on my mind is that the defendants considered it a very small job—a matter of £52—and really did not think it worth their while to give to it that attention which was necessary for the purpose of preventing injury to the plaintiff's property. The matter was really left to those coloured men, and we know without proper supervision how they will bungle matters. I am satisfied that these coloured men were left without any supervision—or only the supervision of a man like Ford—and that they negligently dug the excavation so as to come close upon plaintiff's foundations. That is the impression left upon my mind by the evidence taken as a whole. If that is so, at all events, there was an infringement by defendants' servants of the plaintiff's rights. Plaintiff had the right, at all events, that digging should not be within his boundary. And as the Court has decided in other cases, plaintiff has a further right that the digging should not be so close to his boundary as to endanger the foundations of any house which he may have built upon his land. In this case the defendants' servants went further, because in my opinion they actually came upon plaintiff's land, and there dug the excavation which endangered his house. If that is so, practically the case is decided, because the Court would not then be too acute in inquiring to what extent the excavations have caused the cracks, which are undoubtedly in the wall. I believe plaintiff's evidence when he says that for three years after he had built the house there was no crack, and that these cracks only appeared after the excavations had been made. Even some of the defendants' witnesses say that if this be true that the cracks only occurred three years after the house was built, they would consider that they would look for excavations. Here we have the excavations. It is quite possible that the house may stand for many years without being much endangered. I think that it has suffered only to a very small extent. I think £20 would be quite sufficient to

make the foundations perfectly secure. But plaintiff was bound, when he found that something had been done to endanger his property, to come in self-defence to the Court for an interdict. It is true that by the time the rule came to be made absolute the real danger had been removed, the pipes having been removed from the immediate proximity of the foundations, and for that reason the Court did not make the rule absolute. It was understood at that time that an action would be brought for the purpose of deciding this question of fact, as upon the affidavits there was so much conflict of opinion. Plaintiff is now entitled upon the evidence to £20 damages, there being proof that to make the foundations secure £20 will have to be spent, and I think that judgment must be given with costs of suit and costs of interdict.

Mr. Justice Buchanan concurred. He said that the plaintiff had established the fact that the excavations took place on his side of the former pipe which was laid in the lane, and not on the other side. He thought that the incidental fact that a pipe was there and really ran down the middle of the lane and that the defendants tried to lay the other pipe without removing the existing pipe was a strong element in supporting the allegation that the excavations took place on the plaintiff's side of the lane. He thought £20 was a fair estimate of the damage judging by the evidence of Mr. Esdon, which was of the kind to carry conviction to his mind.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorney, D. Tennant, jun.; Defendants' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice). Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

HOLTMAN V. HOLTMAN. { 1896. Nov. 25th.

This was an action for divorce brought by plaintiff against his wife by reason of her adultery.

Mr. Maskew appeared for the plaintiff.

Mr. Barry produced the marriage register containing an entry of the marriage of the parties.

Andries Holtman said he was married at S. Mark's Church, Cape Town, in 1886. His wife left him six years ago, and went to Somerset Strand, where she now lived with a Malay, named Drakoman, by whom she had two children. There had been two children born of the marriage; the eldest, a boy, was in his custody, and the girl was with her mother.

Jacoba Jackson said the defendant had left her husband because he behaved badly to her. Defendant was now married to Drakoman. She had visited her.

Decree of divorce granted.

[Plaintiff's Attorney, P. de Villiers.]

VAN WYK'S TRUSTEE V. VAN WYK AND OTHERS. { 1896. Nov. 25th. Dec. 2nd. „ 21st.

Will — Construction — *Fidei-commissum* — Substitution—Restraint on alienation—Family—Strangers.

Where a testator imposes a restraint on the alienation of land bequeathed by his will and indicates the persons or classes of persons in whose favour the alienation is forbidden a clause in the will, stating that his reason or motive for imposing the restraint is to prevent the land from falling into the hands of strangers, cannot be construed as extending the restraint beyond the persons or classes of persons indicated by the will.

Where it is doubtful whether a substitution was intended to be direct or fidei-commissary the construction should be in favour of direct substitution.

This was an action brought by Nicolaas Salomon Louw in his capacity as the sole trustee in the insolvent estate of Willem Jacobus van Wyk, senior, against Gert Matthys Jacobus van Wyk, junior, and Alida Jeanetta Wilhelmina Smit (born Van Wyk), the latter married without community of property to Albertus Smit, and by him assisted as far as need be.

The plaintiff's declaration was as follows:

1. Mr. Salomon Louw is the sole trustee (duly elected and confirmed in his appointment) of the insolvent estate of one Willem Jacobus van Wyk, senior, residing at Bovenheim,

in the division of Calvinia, whose estate was lawfully placed under compulsory sequestration on the 13th day of April, 1896.

2. Among the assets of the said insolvent estate are certain pieces of quitrent land ceded and transferred in full and free property by the executors dative of the estate of the late Gerrit Matthys Jacobus van Wyk to the aforesaid W. J. van Wyk by deed of transfer done and executed at the office of the Registrar of Deeds on the 8th day of May, 1892, which pieces of land were specially bequeathed to the aforesaid W. J. van Wyk by a codicil to the will of his late parents, the aforesaid G. M. J. van Wyk and Jacoba Steenkamp, dated 27th February, 1851, of which codicil a true translation is hereunto annexed and marked A.

3. The pieces of land referred to are the remaining extents of the farms Matjesfontein and Avontuur, *alias* Bloemfontein, situated in the division of Calvinia.

4. The said pieces of land were duly and lawfully hypothecated by the aforesaid W. J. van Wyk at different times before his insolvency under and by virtue of three several mortgage bonds duly registered, and still unsatisfied to the extent of £1,325, which bonds have been duly proved against the insolvent estate.

5. It is the duty of the plaintiff as such trustee as aforesaid to sell and dispose of the said pieces of land as assets of the said insolvent estate and for the benefit of creditors, and heretofore on 23rd June, 1896, the plaintiff accordingly advertised the said pieces of land for sale by public auction.

6. On the 19th May, 1896, the defendants by their attorney wrongfully and unlawfully lodged in writing with the Registrar of Deeds of this colony a *caveat* against any transfer of the said pieces of land, wrongfully and unlawfully therein and thereby, and also by a notice in writing addressed to the plaintiff on the said 19th May, 1896, pretending and claiming to be fidei-commissary heirs of the said pieces of land under and by virtue of the will of the parents of the aforesaid W. J. van Wyk.

7. In consequence of the wrongful and unlawful acts of the defendants in the last paragraph mentioned the plaintiff is debarred from duly selling the said pieces of land to the best advantage and passing transfer thereof in the discharge of his trust pending a decision of his right and title so to sell and transfer the same.

Wherefore the plaintiff prays for:

(*a*) An order directing the withdrawal and removal of the said *caveat*.

(*b*) A declaration that he is entitled in his aforesaid capacity to sell and transfer the said pieces of land in full and free property, subject only to the conditions in the abovementioned deed of transfer contained.

(*c*) Such further and other relief as to this Court may seem meet.

(*d*) Costs of suit.

This was the codicil (referred to in the declaration) made on 22nd July, 1848, by G. M. J. van Wyk and J. M. Steenkamp. The will after revoking all previous wills proceeded thus:

And now, as if making a new disposition, we declare first of all to legate, bequeath, and bespeak, as we hereby do legate, bequeath, and bespeak, to the children of the male sex already born, or yet to be born of our marriage, and that after the death of the survivor, our joint and in perpetual quitrent surveyed farm, named Klynfontein, situated in the ward Onder Roggeveld, district Clanwilliam, measuring as per remaining extent, together with all its immovables (fixed to the earth and fixed by nails) and that for an amount of 1,666-5-2 Ryksdaalders or five thousand Cape guilders, Indian currency, besides also our joint and in perpetual quitrent surveyed farm, named Matjesfontein, together with a plot of ground legally bought by the testators from the owners of the farm named Avontuur, *alias* Bloemfontein, adjoining the farm Matjesfontein, a diagram whereof is about to be made, situated in the ward Onder Roggeveld, district Clanwilliam, measuring as per remaining extent, together with all its immovables (fixed to the earth and fixed by nails) for an amount of 6,666 5-2 Ryksdaalders, or twenty thousand guilders, Indian currency, upon the following conditions and stipulations, that no one of the children or heirs shall be allowed to carry on any negotiations in respect of his or her share in both the aforesaid farms, either with blood relations or kinsfolk, or with any stranger, for the purpose of either selling, bartering, letting, loaning or bonding for any money or other value, yea not even to give the same a present, but such child or heir shall only be allowed free, in case he or she shall not wish to retain a share in the aforesaid farms, in such case to sell his or her share to no one but the other parties or heirs holding shares in the aforesaid farms, and that for an amount of money as shall be determined by the concurrence and agreement of the buyers and the seller; and in case the parties cannot come to an agreement, the said share shall be appraised by two impartial men, and according to such valuation the purchase and sale shall be regarded

legal, no one whosoever contradicting. And in case of one of the parties holding shares, being married, should come to die, his or her title or share in the aforesaid farms shall devolve upon his or her legitimate heir or heirs, subject to the same stipulations and conditions as mentioned hereinbefore. Nevertheless, in order to prevent as far as possible everything by which brotherly love and unity might be broken, they shall all be at liberty, as long as there are any legitimate children living, to sell their share or bequeath the same by testament, &c., to one of them of the male sex, without any contradicting on the side of the co-proprietors, provided it be done on such conditions that in case of subsequent re-sale the contents of these presents be strictly adhered to, that the aforesaid farms may not fall into the hands of strangers except through unavoidable calamities.

The defendants' plea and claim in reconvention set forth:

For a plea to the plaintiff's declaration the defendants say:

1. They admit the allegations in paragraph 1, but save as hereinafter is specially admitted deny those in paragraphs 2, 3 and 4.

2. The pieces of quitrent land in the declaration referred to belonged to the late Gerrit Matthys Jacobus van Wyk and his spouse, Jacoba Margaretha Strenkamp, married to him in community of property, hereinafter called the testators, who were the grandparents of the defendants.

3. The said pieces of land were by the testators' joint will, dated July 22, 1848, bequeathed after the death of the survivor to their male children, subject to a *fidei-commissum* in favour of the lawful heirs of such male children, and subject to further conditions and limitations, amongst which were the conditions that the said children and their heirs should not mortgage the said land nor alienate the same except to the other heirs, as will more fully appear from a translation of the portion of the said will referring to the said land hereunto annexed marked "A," which defendants crave leave to regard as herein inserted.

4. Three male children were born to the testators of the said marriage.

5. Thereafter, on or about February 27, 1851, the testators awarded to each of their three said sons a defined share in the said land, but the said division was subject, as the defendants contend, to the general provisions and limitations of the bequest of the said land contained in the said will.

6. Thereafter the testatrix died on or about 14th July, 1851, and the testator died on or about 29th October, 1869, and on or about May 8, 1872, the executors dative of his estate passed transfer to his son, W. J. van Wyk, hereinafter called the insolvent, of the defined share in the said land awarded to him as aforesaid, but the said transfer deed was wrongful, unlawful, and improper in its terms, inasmuch as no reference was therein made to the said will or to the conditions whereunder the said land had been bequeathed.

7. Thereafter, on or about June 12, 1876, the insolvent passed a mortgage bond upon the said property in favour of one J. W. A. Steenkamp for a sum of £600; and on August 16, 1882, for a further sum of £400; and on December 9, 1884, for a further sum of £325.

8. Defendants contend that the said mortgage bonds are invalid as a charge upon the said land, inasmuch as the insolvent was prohibited from mortgaging the said land by the terms of the bequest to him under the said will, and that even should this Honourable Court be of opinion that the said bonds are not invalid as aforesaid, that the insolvent could not mortgage any further or other interest in the said land than the life interest which was bequeathed to him.

9. There are twelve children of the insolvent alive; the said children are fidei-commissary heirs under the said will, and the dominium in the said land is vested in them subject to the life interest of the insolvent; seven of the said children are minors.

10. The defendants contend that no declaration of rights as to the said land can be made unless all the persons interested as fidei-commissary heirs are represented in this suit.

11. They admit that the pieces of land mortgaged as aforesaid are as described in paragraph 3 of the declaration, that the bonds are registered and unsatisfied and have been proved against the insolvent estate.

12. As to paragraph 5, they admit the advertisement, but deny the other allegations.

13. As to paragraph 6, they admit that they lodged a *caveat* with the Registrar of Deeds and crave leave to refer to the terms thereof; they say that the said *caveat* was against any transfer of the said land not in accordance with the terms of the said will.

14. They admit that on May 19, 1896, they notified to the plaintiff that the insolvent had only a life interest in the said properties, but say they do not claim to be the only fidei-commissary heirs entitled thereto; save as above, they deny the allegations in paragraphs 6 and 7.

Wherefore they pray that the plaintiff's claim be dismissed with costs.

And for a claim in reconvention the defendants say:

1. They crave leave to refer to the matters set forth in the plea to the claim in reconvention, and pray that they may be considered as herein inserted. The defendants, now plaintiffs in reconvention, claim:

(*a*) A declaration that the defendant in reconvention can only sell the life interest in the said land, and that the dominium therein is vested in the fidei-commissary heirs, grandchildren of the testators, subject to such life interest, under the terms of the will of July 22, 1848.

(*b*) An order declaring that any subsequent dealing with the said land, or transfer of the insolvent's interest therein, by the defendant in reconvention shall be made subject to the rights of plaintiffs in reconvention, and the fidei-commissary heirs under the said will.

(*c*) Alternative relief.

(*d*) Costs of suit.

I. For a replication the plaintiff said:

1. He admits paragraphs 2, 4 and 7 of the plea and the correctness of the dates assigned to certain events in paragraph 6, but specially denies that the transfer deed of the said pieces of land was wrongful, unlawful, or improper in its terms, as in the said paragraphs is alleged.

2. As to paragraphs 3 and 5 of the plea, he begs to refer this Honourable Court to the terms of the said will, and of the codicil thereto, under and by virtue of which codicil the said transfer was only passed to Willem Jacobus van Wyk, senior, and he submits that the bequest in the said codicil is free from any of the conditions or limitations contained in the said will.

3. He does not admit the contention of the defendant as to the construction of the said will; or that even if the conditions and limitations therein contained were attached to the bequest made in the codicil, the defendants would have any title or right as fidei-commissary heirs, or have any right in law to raise objection and lodge any *caveat* against the sale and transfer by the plaintiff in the discharge of his duty as trustee, of the said two pieces of land held by him in registered title in full and free property, and lawfully mortgaged and hypothecated to J. W. A. Steenkamp in manner set forth in the declaration and plea, of which mortgages the defendants were, in fact, well aware, and against which they raised no protest, but acquiesced therein.

4. He admits that there are twelve children of the insolvent alive, but says that none of them, save the defendants, have lodged any *caveat* or raised any objection or protest by which he is prejudiced as trustee of the insolvent estate in the discharge of his duty, and in the sale of the said two pieces of land to the best advantage as assets of the estate, and submits that he is entitled to have and maintain this action by reason of the wrongful and unlawful acts of the defendants.

5. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the plea, he denies all allegations of fact and conclusions of law therein contained, joins issue thereon with the defendants and again, as before, prays for judgment, with costs.

II. For plea to the claim in reconvention, the plaintiff (now defendant) craves leave to refer to the several allegations in the declaration and replication, and prays that the claim of the defendants (now plaintiffs) may be dismissed with costs.

The defendants' rejoinder and replication to the claim in reconvention set forth that in or about October, 1895, they first became aware of their rights under their grandparents' will in their plea set forth: since that date they have never in any way recognised the validity of the said bonds as a charge upon the land purported to be burdened, for some years prior to that date they were aware of the said bonds and did not protest against the same. (Otherwise the rejoinder was general.)

Upon these pleadings issue was joined.

Annexure A referred to in the plea was as follows:

By virtue of the reservatory clause in this our above testament, and the right reserved to ourselves at any time to make such alteration or additions at the foot thereof as we should be advised, be it known that we have agreed and determined with regard to our homestead Matjesfontein, which in our testament we bequeathed jointly to our three sons, Gert Matthys Jacobus, Floris Adriaan Jacobus, and Willem Jacobus van Wyk, to bespeak to each of them one-third or separate share in the said farm Matjesfontein, to be assumed and possessed by them after the survivor's death.

Mr. Innes, Q.C., and Mr. Schreiner, Q.C., appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Jones for the defendants.

For the plaintiff

Wilhelmus Arnoldus Steenkamp, of Matjes Kloof, Calvinia, said he was a bondholder of the ground in question. The first bond was for £600. When he advanced the money he knew nothing of a will touching the land. His second

bond of £400 was in August, 1882, and he had then heard of some talk of a will referring to the land. He went to the insolvent who said it was untrue, and said the land was transferred in his name. In 1884 he advanced a further £325 on the land, so that Van Wyk might pay off Nightingale, an original bondholder. The two male defendants signed a deed of renunciation, and also the guardians. In 1887, Van Wyk owed £128 interest. He paid £28, and gave an acceptance for £100, the defendants signing as sureties. Afterwards that £100 acceptance was changed for two £50 promissory notes, which were not signed by the daughter Alida. One of the notes was still owing, and a small balance was owing on the other.

Cross-examined: He did not know when Van Wyk's brother Floris died and Gert Matthuys became insolvent that the heirs had to renounce certain rights before the property could be transferred. He had said before the Commission that he had heard that the property was to go to the sons and daughter. He had believed Van Wyk when he said that the property was his own, and besides, all the other ground in the estate had been sold, so he took no notice of the stories. He would not have advanced the £325 if the two male defendants had not renounced their rights under the "kinderbewys." Van Wyk had been in difficulties since 1887, and he had sequestrated the estate in April last.

Nicholaas Solomon Louw, trustee in the insolvent estate of Van Wyk, said there were no assets beyond the land in question, and Steenkamp was the only creditor who had proved.

Cross-examined: As soon as he advertised the land for public auction a caveat was lodged by the defendants. There were seven minors and two majors amongst the children of the second marriage. The land in question was not worth £1,000. Van Wyk was now about sixty years of age, so that his life interest in the land was worth little. The two male defendants were born, one in 1861 and the other in 1862, and the daughter in 1864.

This closed the plaintiff's case.

At this stage Mr. Searle asked for absolution from the instance.

Mr. Searle: Before calling witnesses we contend that no declaration as under prayer (*a*) or (*b*) can be made—and we ask for absolution—as the minors are not before the Court and the practice always is to order minors to intervene.

The Chief Justice: Your objection affects count (*b*) not count (*a*)

Mr. Searle: It does we submit affect both. The *caveat* is not correctly described in prayer (*a*): it is in the plea. The Registrar of Deeds need not take any notice of it, but if it is brought to his notice that there are minors he can refuse to proceed with the transfers But he has not refused: as soon as the *caveat* was lodged plaintiff went on with the action for declaration of rights. *Van Rooyen* v. *McColl* (3 J., 284) shows our practice where minors are interested.

The Chief Justice: The objection should have been raised before any evidence was taken.

Mr. Searle: We took it long ago and asserted our position on the pleadings, but the plaintiff did not admit it on the plea, and we had to prove it before the Court. (Correspondence was put in between the attorneys admitting that seven children were minors.)

Mr. Innes: This is an application for absolution from the instance. But that is applied for where the evidence does not support a declaration which raises a *prima facie* case. But if the declaration is now excepted to as not raising such a case the defendants should have excepted and had the exception argued in the usual way. The minors have the hypothecary action—and the *rei vindicatio*, and they cannot be prejudiced by any order now made. The minors are not themselves objecting. Let there first be proof that there is a *fidei-commissum*.

The Chief Justice: We will hear defendants' evidence and the arguments, and will give judgment or not according as to whether we find that the minors are interested.

For the defendants.

Gert Matthys Jacobus van Wyk, eldest son of the insolvent, said he was thirty-five years of age. There were four children by his father's first marriage and one was dead. By the second marriage there had been eleven children, and two were dead. Two only were majors. In November, 1895, he was first acquainted with his rights under his grandfather's will. His father had mortgaged the land in question, and he and his brother had helped him to pay the interest until they knew of their rights under the will. He remembered his father asking for the last loan, but Steenkamp said he could hardly lend him the money, considering the terms of the will of his (witness's) grandfather. Steenkamp held a piece of paper in his hand, which he said was the will, but he would not show it to his father. When he signed the renunciation, Steenkamp told them they had received all their rights under their mother's will, and they had to sign to satisfy their father. Steenkamp forced them to sign by saying that he would drive their father off the ground if they did not. His father was anxious to borrow the money, as Nightingale was pressing him hard.

Cross-examined: He had not received his portion from the mother's estate—£165. The guardians might have said that he had received it, but it was not so. His father was not in a position to pay it. His father had said that he did not know what his (witness's) grandfather's will was. He did not know that his father was executor in his uncle Floris's estate. He did not read the deed of renunciation which he had signed. He had only had four months' schooling in his life.

This closed defendants' case.

Mr. Innes, Q.C., for plaintiff: Even if the conditions of the will are incorporated in the codicil (which plaintiff does not admit), is the effect to create a *fidei-commissum* in favour of the children of the insolvent? For if there is no *fidei-commissum* the case is concluded in favour of plaintiff, but if there is a *fidei-commissum* what are the rights and remedies of the fidei-commissary heirs? Are they entitled during the lifetime of the fiduciary to object to his trustee selling land to which he holds clean transfer and which has been duly bonded, and if they are not entitled so to object, can they possibly succeed in this action? In cases of doubt, the Court will be bound to find in favour rather of a substitution than a *fidei-commissum*. *Van Leeuwen* (Cens. For. Pt. I, Book III., Chapter 6, section 2); *Voet* (28, 6, 3 and 15).

In Roman-Dutch law where a will is in any way doubtful, the interpretation is in favour of direct rather than fidei-commissary substitution. Now the special difficulty in the will arises out of the clause *in case* one of the parties should come to die, *i.e.*, before the surviving spouse as we contend; further, "subject to the same stipulation as before." What does this mean? If it is a direct substitution that is intended, this clause is intelligible, whereas if defendants' view is held to be correct, it would mean that none of the grandchildren would be able to sell to any other than to themselves. But this must be clearly proved, the presumption of the law is against restraints on alienation. Now the words *Deelhubber* and *Erfgenaam* are apparently used in the earlier part of the will as synonymous terms, therefore when used later, "deelhebber," must have the same meaning. Yet the will uses the words "male or *female* (deelhebber) shareholders" in this later part: *deelhebster*, *i.e.*, there must also be equivalent to *erfgenaam*. But the will only applies in first part to sons—clearly the confusion in the later part is due to the idea in the mind of the testator that he was making a substitution in favour of both sons and daughters. Surely there is no *fidei-commissum* when in one clause the heirs (*i.e.*, insolvent or his brothers) are entitled to choose any of his sons he wished and make him heir or sell to him the land. The authorities in the Deeds Office have clearly taken our view, the clause of the will was registered in the Deeds Office with the transfer, yet transfer after transfer has been allowed there. If the Court is for our view the rights of the defendants are *nil*. If the Court is against us what are the rights of the fidei-commissary heirs? Such heirs have a personal action or the vindicatory action or hypothecary action. But all these remedies are only available for the fidei-commissary at the death of the fiduciary: *Voet* (6, 1, 6). The defendants' claim the *dominium*, and therefore apparently rely on the vindicatory action, but if they are fidei-commissaries the fiduciary has the *dominium* and they are therefore premature in their action, their right has not vested. As to the minors, how are they damaged? They do not lose the vindicatory action till a year after majority if they have the *dominium*, so that a declaration of rights would not prejudice the minors. We would not have been justified in incurring the expense of bringing the minors before the Court, and getting a *curat r ad litem* appointed. Even if the Court finds that the defendants are fidei-commissaries and have a *locus standi* even though the *dies non cedit*—yet what is the view the law takes of *bona-fide* mortgagees without notice? It is as favourable a one as possible. Now in respect of the second and third bonds Steenkamp is not a *bona-fide* mortgagee without notice, but as to No. 1 he is. True the mortgagee cannot take advantage of section 9, Act 5 of 1861, but under the common law the Court has often protected *bona-fide* mortgagees lending to a fiduciary in whom the right is vested. *Hiddingh* v. *Roubaix* (Buch. 78, 86); *Williams* v. *Williams* (5 Sheil, 493); *Haupt* v. *Van der Heever* (6 Juta, 49). Of course if the mortgagor's title is not clean our argument falls away—but is the mere mention of the codicil in the deeds sufficient? For in the codicil itself there is no mention of any condition. The transfer does not refer to any condition in codicil; *i.e.*, it gives clear transfer. As to the two brothers who signed the deed of renunciation if they merely acknowledged the will they would be out of court: but they shuffle now and pretend that though they were majors at the time of signing the deed they did not understand it. The onus is on them to prove this.

Mr. Searle: Did the codicil revoke the provisions of the will? The plaintiff seems to abandon the contention that it did. Of course

the codicil must be read with the will, as forming one instrument with it. *Board of Executors and Grewer* v. *Morgan* (6 H.C., 25); *Voet* (28, 3, 8); *Van Leeuwen Cens. For.* (Bk. III., Chapter II., section 9). As to *fidei-commissum*—there is no direct provision making children heirs, but *Oosthuizen* v. *Mocke* (1 Ros., 339) does interpret a similar clause as making children heirs. For simple substitution see *Lint* v. *Zipp* (Buch. 1876, page 181); *Wannenberg* v. *Le Roux* (5 Sheil, 338.) The Court has in no case held it a substitution where there was a general prohibition of alienation in favour of the family. The doctrine of substitution is only applicable in cases like *In re Zipp* (Buch. 1878, p. 132). There *is* a prohibition of alienation here, it requires very little more to hold it intended to constitute a *fidei-commissum*.

The Chief Justice: But the expression used is such a curious one, "in case they should die." They must die, the dying is not the contingency; the contingency must be the dying before the survivor or something like that.

Mr. Searle: We contend it means that the contingency is "should one die married and having children." The phrase "unavoidable calamity" is curious—perhaps it means if the race die out.

Mr. Innes: The plaintiffs contends it refers to insolvency.

Mr. Searle further referred to *Trustee Jonker* v. *Jonker Executor* (1 Ros. 334). The only case where fidei-commissaries are prevented from following out rights under a will is where a *bona-fide* purchaser acquires from the executor for valuable consideration without notice. See also *In re Brown* (7 Juta, 237); *Lange* v. *Scheepers* (Buch. 78, page 92); *Lange* v. *Liesching* (Foord, p. 55); Act 5 of 1861, section 9; *Haupt* v. *Van der Heever* (6 Juta, 49); *Oosthuizen* v. *Moffat* (5 Juta, 319); *Booysen* v. *Orphan Chamber* (Foord, p. 48); *Van der Poel* v. *Colyn* (2 Searle, 276).

The further hearing of the case was postponed till the 2nd December.

Postea (2nd December).

Mr. Searle continued his argument for the defendants, and referred to *Sande* (Restraints on Alienation, Webber's Translation, p. 205); *Voet* (36, 1, 27 and 28); *Van Leeuwen* (Censura Forensis, 3, 7, 10 Foord's Translation, page 9).

The Chief Justice: See *Sande* (page 210). If the testator merely adds the words "*because* I do not wish the property to go to strangers" a *fidei-commissum* in favour of the family is created.

Mr. Searle: See *Voet* (36, 1, 69). In the same passage in a will there may be both direct and oblique fidei-commissary substitution of heirs: *Van Leeuwen* (Censura Forensis, 3, 6, 16 and 15) Foord's Translation, page 87).

The Chief Justice: Besides the one clause (in case one of the shareholders should come to die), what is there to show that any one but the *sons* was intended to be his heir?

Mr. Searle: We must read the clause and will as a whole and it seems to show that by "heirs" the children and descendants are meant. The will can hardly be referring all the way through to certain three persons: *Van Leeuwen* (Commentaries, 3, 8. 6, pages 376 and 377, Vol. I., Kotzé's Translation).

De Villiers, C.J.: The clauses of the will in respect of which the present dispute has arisen have not been very accurately translated. It is indeed difficult to make an accurate translation of them without making complete nonsense of the testators' meaning. So far as there is any sense in them they are somewhat contradictory of each other. It is, however, reasonably clear that the testators intended that their own sons should have the benefit of the restraint placed on the alienation of the farms bequeathed by the will. It is not equally clear that the testators intended that their grandchildren and subsequent generations of descendants should also have the benefit of the restraint. Two passages are relied upon in support of the defendants' contention that a *fidei-commissum* has been created in favour of the grandchildren. The first passage is as follows: "In case one of the shareholders," that is the sons to whom the farms are bequeathed, "should happen to die his right or share in the said farms shall devolve upon his lawful heir or heirs, subject however to the same limitations and conditions as have heretofore already been made known." The expression "in case they should happen to die" is peculiarly inappropriate as applied to all future time: whereas it would be perfectly appropriate as applied to the possible event of any of the legatees dying before either or both of the testators. The meaning, at all events, is extremely doubtful, and that being so, the rule would apply that the construction should be in support of a direct rather than a fidei-commissary substitution *Voet* (28, 6, 3). The next passage relied upon on behalf of the defendants is that in which the testators state their reason for imposing the restraint in the following terms: "in order that otherwise the said farms would, by reason of unavoidable calamities, fall into the hands of strangers." The passage is ungrammatical, and would have better sense if instead of "opdat—in order that" the testators had used the word "omdat—

because." In either case the passage seems only to supply the reason or motive which induced the testators to impose the restraint, and cannot be construed as extending the restraint beyond the persons or classes of persons in whose favour it was imposed. If authority were required in support of this view I need only refer to *Sande on Restraints* (Webber's Translation, 3, 5, 16). The plaintiff, who is the trustee of the insolvent estate of one of the testator's sons, asks for a declaration that he is entitled to sell and transfer the land bequeathed to the insolvent, in order to pay off the mortgage on the land. The mortgage was effected by the insolvent, but if the restraint extended beyond the first generation the insolvent could not have mortgaged the land to the detriment of his children. As to the testators' own remaining sons it is common cause that there is not one surviving, and the present defendants are the major children of the insolvent. His minor children are not, however, before the Court, and no final judgment will be given until they have had an opportunity of being heard by counsel. The Court will appoint Mr. McGregor as their *curator ad litem* and will grant a rule *nisi* calling on him to show cause on the 12th of December, why the second prayer of the declaration shall not be granted.

Postea (December 21st).

Mr. McGregor appeared as *curator ad litem* for the minors: He said. The minors are here at the instance of the Court, and therefore they only come in at the present late stage of the case. But if any claim, *e.g.*, for rectification of a deed, &c., could have been made the Court should even at this stage allow it to be discussed, though we do not formally raise any claim. Where there is a substitution the presumption is that it is a direct one and not a fidei-commissary. But it is only a presumption and a rebuttable one. The minors are only interested if the will constitutes more than a mere direct substitution. Difficulty must not be confounded with doubt. *Grotius' Opinions* (De Bruyn's Translation, p. 7 and p. 284). The will may be so worded that it may become either direct or fidei-commissary substitution as events happen. Now in cases of doubt in a will the rules of interpretation are:

1. The will and codicil must be construed together.

2. The will must be construed as a whole.

3. Effect must be given to testator's intention as gathered from his condition and the circumstances of the country. See *Voet* (De Rebus Dubiis 35, 5, 4); *De Jaeger* v. *Muller's Executor* (Buch. 1870, p. 55). The plaintiff contends for mere direct substitution, we contend for something more. The words used are appropriate to a trust—clearly there are third parties contemplated as remainder men. The bequest is at first only to the male sex, in the next clause of the will the words *he* or *she* are used. See the "*Byaldien*" clause. *Byaldien* is equivalent to *quocunque tempore* (Holl. Cons. 92).

The Chief Justice: Yes, in the case referred to in that opinion it is so because there is no certainty that a man will have *children* before he dies (which was the condition in that case), but it is certain he must *die*, therefore that cannot be the condition in this case. It might mean "if he come to die before the testators."

Mr. McGregor: By "erfgenaam" surely the testator means children; "*wanneer wettige kinderen*" must either refer to the legatees or not. It cannot refer to them, as they are lawful children. "*Opdat*" ought clearly to be "*omdat*" and the Court has clearly power to correct a manifest mistake.

The Chief Justice: We will assume it is meant for "omdat." Have you seen *Sande* (3, 5, 16)?

Mr. McGregor: Yes; but the personal prohibition is enough to secure the minors; *Sande* (Webber's Trans., p. 177); *Voet* (36, 1, 27). This is a *fidei-commissum simplex*, *i.e.*, binding on one grade only, *i.e.*, the fiduciary heir: (*Sande*, (p. 215). A substitution may be *compendiosa*, *i.e.*, vulgar or fidei-commissary, as circumstances eventuate: *Holl. Cons.* (92); *Huber* (Obs. Res. Jud., p. 369); *Voet* (36, 1, 69); *Burge* (2, page 96). If there is a *fidei-commissum* what are the rights of the parties? Authorities call mortgage an alienation. *Gondsmidt's Pandectae* (pages 7, 284); *Voet* (36, 1, 4); *Sande* (208, 204, 244).

The Chief Justice: But the will prohibits not only alienation but mortgage.

Mr. McGregor: *Sande* shows if that if there is an alienation by the fiduciary then the fidei-commissary can claim at once. See *Lange* v. *Scheepers* (Buch. 78, p. 92); *Muhlenbruch* (Doct. Pand. Vol. 3, p, 407).

Postea (December 21st).

The Chief Justice said: The case on behalf of the minor children has been very ably argued by Mr. McGregor, but he has not succeeded in convincing the Court that the view provisionally taken of the will was erroneous. He has properly remarked that difficulty in the construction of a will does not necessarily imply doubt, but in the present case there is both difficulty and doubt. It would be peculiarly hard upon the plaintiff if the obscure language used in the will be held to impose a *fidei-commissum*. He lent the money

on mortgage in the belief that the land belonged to the mortgagor and that belief may fairly have been strengthened by the fact that land bequeathed to one of the insolvent's brothers on conditions similar to those now under consideration had been allowed by the Registrar of Deeds to be transferred to strangers. A point has been made of the fact that the use of the word "deelhebster" shows that the testators contemplated the possibility of females being "shareholders" of the land bequeathed, but it does not show that the testators wished such females to share unless their father, being one of the testators' sons, should die before either of the testators. I agree with Mr. McGregor that the will should be construed as a whole and, so construing it, I adhere to the view that no *fidei-commissum* was intended to be created in favour of the insolvent's children. The rule must therefore be made absolute.

[Plaintiffs' Attorney, S. J. Mostert; Defendant's Attorney, V. van der Byl.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

JACOBSOHN V. GREYLING. { 1896. Nov. 26th.

Mr. Benjamin applied for the final adjudication of the insolvent's estate.

Order granted.

DICKSON V. BROADBENT.

Mr. Benjamin applied for a provisional sentence for £351 18s. 6d., less £35 paid on account, together with certain amounts for interest.

Provisional sentence granted.

ILLIQUID ROLL.

FAIRBRIDGE AND CO. V. BAART.

Mr. Tredgold applied for judgment for £25 for professional services rendered, with interest.

Application granted.

REHABILITATIONS.

The rehabilitations of Philip Rudolph Theunissen and Richard Henry Bartlett were granted.

IN THE ESTATE OF THE LATE JAN M. HOETS.

Mr. Graham applied for authority to the executors to raise a sum of money on mortgage of the landed property of the estate to enable the surviving widow to erect buildings on property belonging to her at St. James, all the interested parties having consented thereto.

Order granted.

IN THE MATTER OF THE VICTORIA SALT SYNDICATE.

Mr. Innes, Q.C., appeared for presentation to the Court, in terms of section 154 of the Companies Act, of the report of the liquidator appointed for the voluntary winding up of the said syndicate.

Usual order granted.

MARAIS AND OTHERS V. VAN GRAAN AND OTHERS.

Mr. Jones applied to make the award of the arbitrators in the matter between the parties in respect of the farms Hex River, Onder Aan de Norree, and Norree, situated in the division of Robertson, a rule or order of this Court.

Order granted.

THE PETITION OF DANIEL H. ROSSOUW AND ANOTHER.

Mr. Buchanan appeared for authority to the Registrar of Deeds to accept the transfers of the sub-division of the remaining extent of the farm Riet Valley, in the division of Robertson, on the basis of the extent certified by the Surveyor-General, in lieu of the erroneous extent described in the original grant and subsequent transfers.

A rule was granted ordering all concerned to show cause on December 12 why the rectification shall not be made as prayed. The order to be published in a Worcester newspaper, in Dutch and English language, and if no notice of opposition is given before December 12 the Registrar will allow the transfers without further application.

HAWORTH V. HAWORTH.

Application of the defendant for removal of the bar in the suit be-

tween the parties, and for leave to file his plea, and further, for an order postponing the hearing of the case until the 1st of February next on account of the distance at which the defendant resides from Cape Town and the difficulty in travelling through drought.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Innes, Q.C., appeared for the respondent.

Order granted on condition that by this (Friday) morning at ten o'clock the costs of the witnesses and costs of the present application and costs of the bar be paid; with liberty to claim to recover the money in the action if the action should proceed. If the money be not paid at the stated time the case to proceed.

[Applicant's Atttorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, P. de Villiers.]

IN THE MATTER OF THE MINOR NICHOL.

Mr. Roos applied for authority to the Master of the Supreme Court to pay out of the paternal inheritance of the said minor deposited in the Guardians' Fund an amount to enable her to complete her education at the Wynberg Seminary, or S. Cyprian's, Cape Town.

Application granted.

THE MASTER OF THE SUPREME COURT V. LYNCH'S TRUSTEES.

Mr. Sheil applied for an order requiring the respondents to file the liquidation account and plan of distribution in the insolvent estate of Henry W. Lynch, and to personally pay the costs of this liquidation.

Usual order granted.

HOPEWELL V. CONROY. { 1896. Nov. 26th, „ 27th.

Malicious prosecution—Reasonable and proper cause—Wilful falsehood—Tampering with jury—Costs.

An action was instituted against C. *for an offence against the Liquor Licensing Act of 1883 and* C. *was found guilty.*

C. *thereupon charged* H. *with perjury, but* H. *was acquitted.*

H. *thereupon sued* C. *for damages for malicious prosecution.*

The Court held *that* C. *had reasonable and proper cause for prosecuting* H., *and that* C. *had not committed any wilful falsehood in the affidavit charging* C. *with perjury and gave judgment for defendant without costs on account of the defendant having tampered with some of the jury prior to the trial for perjury.*

This was an action for £250, damages for malicious prosecution.

The plaintiff's declaration alleged:

1. The plaintiff and defendant reside at Worcester.

2. At the date of the grievances hereinafter complained of the plaintiff was a member of the Worcester Police Force, and the defendant was the lessee of the Commercial Hotel, Worcester.

3. On the 19th of December, 1895, the defendant was charged before the Acting Resident Magistrate of Worcester with contravening sub-section 7 of section 73 of Act 28 of 1883, by keeping his licensed premises open for the sale of liquor at a time when he was not authorised by his licence to sell, and the defendant was found guilty and sentenced.

4. At the time of the charge against the defendant, referred to in the last paragraph, the plaintiff was a witness and gave evidence on behalf of the prosecution.

5. Thereafter, on or about the 23rd December, 1895, the defendant falsely and maliciously, and without reasonable and probable cause, appeared before the Acting Resident Magistrate of Worcester, and made an affidavit charging the plaintiff with having committed perjury at the trial referred to in paragraph 3 of this declaration. In consequence whereof a warrant was issued for the apprehension of the plaintiff, and the plaintiff was arrested on or about the 27th December, 1895, and thereafter prosecuted for the said crime of perjury at the Worcester Circuit Court on the 6th day of October, 1896.

6. At such trial the plaintiff was acquitted, and thereupon the prosecution was determined.

7. By reason of the above conduct of the defendant the plaintiff has been injured in his character and has been put to great expense in obtaining his release from custody and imprisonment and has suffered damages in the sum of £250.

8. All things have happened, all times elapsed, and all conditions fulfilled necessary to entitle the plaintiff to claim the said sum of £250, but the defendant refuses to pay the said sum or any portion thereof.

Wherefore the plaintiff prays:

(*a*) For judgment in the sum of £250 as damages aforesaid.

(*b*) Alternative relief.

(*d*) Costs of suit.

The defendant's plea set forth:

For a plea to the defendant's declaration the defendant says:

1. He admits the allegations in paragraphs 1, 2, 4, and 7, but denies those in paragraphs 8 and 9.

2. As to paragraph 3, he admits that on December 19, 1895, he was found guilty of a contravention of sub-section 7 of section 73 of Act 28 of 1883, and was sentenced by the Acting Resident Magistrate of Worcester to pay a fine of £1 sterling, and he craves leave to refer to the records of the said prosecution and says that he has appealed from the said conviction.

3. As to paragraph 5, he admits that on or about December 23, 1895, he made an affidavit charging the plaintiff with having committed perjury at the trial in the 2nd paragraph of the plea referred to.

4. A warrant was thereafter issued for the plaintiff's apprehension and the plaintiff was arrested on or about December 27, 1895.

5. Thereafter a preparatory examination was held before the Resident Magistrate of Worcester, and the plaintiff was committed for trial upon the said charge of perjury.

6. Thereafter the Honourable the Attorney-General caused the plaintiff to be indicted upon the said charge at the Worcester Circuit Court on October 6. 1896. and the plaintiff was tried upon the said indictment. Save as above he denies the allegations in paragraph 5, and especially that he acted in any respect falsely, maliciously, or without reasonable and probable cause.

7. As to paragraph 6, he admits that one Oliff who had acted on his behalf at the trial in paragraph 2 of the plea referred to, and was thereafter acting on his (defendant's) behalf, assisted at the preparatory examination above referred to, on behalf of the prosecution, and he craves leave to refer to the records thereof; he denies that he acted falsely, maliciously and without reasonable and probable cause, and says that he acted *bona-fide* and honestly throughout the said proceedings.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

For a replication to the defendant's plea the plaintiff said as follows:

1. He admits the defendant has appealed from the conviction referred to in paragraph 2, of the plea, and says the said ap cal has been dismissed and the conviction upheld by judgment of this Honourable Court.

2. He admits the allegations in paragraph 5 of the plea and admits that the plaintiff was indicted and tried at the Worcester Circuit Court on October 6, 1896, and admits that one Oliff, a law agent practising at Worcester, acted on behalf of the defendant at the trial referred to in paragraph 2 of defendant's plea, and thereafter at the preparatory examination referred to in paragraph 5 of the plea.

3. Save as above and save in so far as the defendant admits any of the allegations in the declaration, the plaintiff denies all the allegations contained in defendant's plea and joins issue therein, and again, as before, prays for judgment with costs.

Upon these pleadings issue was joined.

Mr. Graham (with whom was Mr. Buchanan) appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. MacLachlan), appeared for the defendant.

Charles Henry Hopewell said that in December last he was a police constable at Worcester, having joined in August. On December 14 he was on special duty with Chief Inspector Thacker and P.C. Jebb. He heard the town clock strike twelve, and after waiting three minutes they went to the hotel of defendant and told him that he was open after hours. Thacker and witness were in uniform, and Jebb in plain clothes. Conroy was acquainted with him (witness). Conroy was standing in the bar with his back to the counter. There were about twenty people in the bar. Conroy must have seen him. Conroy said his clock was ten minutes fast. It then stood at seventeen minutes past twelve. He gave evidence in the case against Conroy. The Court adjourned, and Mrs. Conroy was the first witness after the adjournment, and she said that he (witness) was not in the bar. On December 27 he was arrested on a charge of perjury. They were all three right inside the bar. He had been suspended, and temporarily lost his salary. His legal expenses had been over £46.

Cross-examined: Conroy did not get on well with Thacker. Conroy had a sort of ill-feeling against all the police. He (witness) received no payment for the work he did at Worcester after suspension. He had come to Cape Town as special constable in charge of prisoners. He got employment in the Deeds Office, but one day took drink, and did not return. He had been out of employment since. The statements of Minaar, Daniel du Toit, and Mrs. Conroy that he could not see the clock because he never entered the bar were contradictory and quite untrue. The jury had taken some time to consider their verdict. Although it was stated that Conroy was standing near the door, it was untrue. Witness and the other police officials only remained in the bar for a couple of minutes. The town clock

did not strike except at the hours. A witness, he believed, swore that the clock struck after the police left the bar. Thacker took an interest in his case, doubtless thinking he was hardly treated.

By the Court: Conroy must have seen that he was a yard and a half inside the bar.

Thomas Joseph Thacker, Sub-Inspector and Chief Constable at Worcester, said he had been at Worcester since 1884, and was appointed Sub-Inspector in 1890. On December 14 he left the police-station with Hopewell and Jebb to try and catch two Germans for robbery. They heard the clock strike twelve whilst standing near the hotel, and three minutes afterwards they went to the bar. Conroy was three and a half yards inside the door. He went up close to Conroy, Jebb being just behind and Hopewell in the rear. Conroy said his clock was ten minutes fast, and he then told Conroy that his clock stood at seventeen minutes past twelve.

Cross-examined: Jebb was not in the service now, having been dismissed for drunkenness. Jebb had been detained in gaol till he gave evidence on his witness's application, as it was rumoured he was leaving the Colony The barmaid at the time in question had since married a policeman. Both constables were inside the bar when he spoke to Conroy. Hopewell showed Jebb where the clock in the bar was hung. There was confusion in the bar when he entered, one man shouting, "Look out, here's Thacker." There had been ill-feeling between himself and Conroy with reference to some remarks about witness's son made by Conroy.

Arthur William Jebb, formerly mounted constable at Worcester, said he was amongst the trees about 200 or 300 yards from Conroy's hotel when the clock struck twelve. He could see into the bar. Hopewell showed him the clock when they got into the bar. He had been dismissed for drunkenness, but he did not think it a very serious thing. He did not care whether he was dismissed or not. He was kept in gaol for five months and a few days. At a rough guess there were a dozen people in the bar. He knew none of them.

By the Court: Conroy must have seen Hopewell. He did not hear Hopewell tell him where the clock was; he just nodded with his head in the direction of the clock.

John B. Naude, farmer, Over Hex, said he was at Conroy's hotel on the night in question. When the officers went in he was outside. He then went to the door to look, and saw Conroy at the bar. Conroy, he thought, could see Hopewell, and Hopewell could see the clock. Conroy was not standing up against the door and holding it.

William Grassman, carpenter, Robertson, said he was in the bar when Thacker came in on the night in question. When he went out soon afterwards he passed Hopewell. Nobody was then holding the door. Anybody standing in front of the bar could have seen Hopewell.

Cross-examined: In January last he received a letter from Thacker, but up to that time he had not spoken to Thacker.

Oliver P. Burgers, juryman at the last Circuit Court at Worcester, said that he was staying at the hotel, and the night before the trial Conroy invited him to see the position of the clock, saying that other jurymen had been to see.

For the defence,

Michael Coenrad Conroy, proprietor of the Commercial Hotel, Worcester, said that in December last he was fined £1 for a liquor offence. After the trial he made an affidavit with respect to plaintiff, and still believed its contents to be correct. When Thacker came in he was standing between the door and the stove. Thacker stood near the door, and said it was two minutes past midnight. He asked to see the sub-inspector's watch, and it was then exactly twelve o'clock by the watch. The clock, which was ten minutes fast, stood at seven minutes past twelve. Hopewell was not in a position to see the clock. The customers went out, and directly they had got out the town clock struck twelve. To see the clock a person would have to come into the bar, a distance of 3 feet 4 inches or 3 feet 6 inches, and then crane one's neck to see the time by the clock. Louie Philips, the barmaid, was now in the Upington district. She had said that the clock only pointed at seven minutes past twelve.

Cross-examined: He had tried to find Louie Philips, and only recently heard she was ill in bed. Petersen he could not find. He was standing about 3 feet 4 inches inside the door, holding the door, when Thacker came in. Naude was in the bar until Thacker came, then he was the first to run out. Burgers had told him that he was on the jury. He had not told Burgers that it was impossible for Hopewell to see the clock. If Hopewell had been in the bar he must have seen him. Thacker was trying to intimidate the witnesses against Hopewell in the perjury case, and he was bound to ask his agents to acquaint the Attorney-General. On the evening in question Thacker came across the road to the bar in a very great hurry.

Re-examined: Hopewell stood just outside the threshold of the door.

By the Court: One pace from the door the face of the clock could not be seen. Knowing the fact that Hopewell said he was inside he

had pointed out to Burgers that Hopewell stood outside. He might have been acting unfairly in pointing that out to a juryman.

James Minnaar, produce dealer, Worcester, said that on December 14 he was in defendant's bar. Thacker was just coming in as he was going out, and he said to Conroy that it was after twelve. He showed his watch, and Conroy said that it was just twelve Hopewell never went into the bar, standing just outside in the shadow.

Cross-examined: He was watching Hopewell the whole time. He had helped Mrs. Conroy to put up the shutters ten minutes before Thacker came. He watched the proceedings from the hotel side of the sluit.

Daniel du Toit said Thacker and Jebb went into the bar, but Hopewell stayed on the stoep. He passed Hopewell just in the door. Hopewell never went inside. Conroy had one hand on the door of the bar when the officers were there.

Anna Isabella Conroy said she saw Thacker come in. Conroy was standing at the door. Hopewell never came inside the door. After all the people were out in the street she heard the town clock strike twelve. When Thacker was in the bar their clock pointed to seven minutes past twelve. To see the clock one would have to be two paces in the bar.

Cross-examined: Thacker stood with one foot in the bar and one on the threshold. Jebb was in front of Thacker.

John Frederick Oliff, law agent, said that he defended Conroy in the liquor prosecution He found that from the doorway it was impossible to see any part of the dial of the clock. One had to be within the door forty inches to be able to tell the time by the clock. He made no endeavour to induce the Attorney-General to prosecute Hopewell for perjury, although he knew that great efforts were being made to work up Hopewell's case, whilst the witnesses for the prosecution were leaving the district.

After argument,

The Chief Justice gave judgment as follows: This case originated with a prosecution instituted in the Resident Magistrate's Court at Worcester against the present defendant for a contravention of the Liquor Licensing Act, and in the course of the trial witnesses were called on both sides, and the important question decided was whether or not liquor had been sold after twelve o'clock at night. The witnesses for the prosecution swore that the place was kept open after twelve o'clock, and the witnesses for the defence were equally positive that it was not yet twelve o'clock when the place was shut. The question now raised in the present case is one of the points which had to be decided in the Court below, but it was not essential. The present plaintiff stated then that at about three minutes past twelve he and Inspector Thacker and P.C. Jebb entered the bar of the defendant's hotel; that Thacker went first, Jebb followed, and finally he (Hopewell) also entered the bar, but there was no statement before the Magistrate as to what distance he had gone into the bar. The plaintiff stated that he could see the dial of the clock, and that by that clock it was seventeen minutes past twelve. The defendant himself then began investigating with his friends as to whether it was possible for a person who had barely entered the bar to see the time, and they were satisfied from their investigations that it was necessary to go at least forty-six inches into the bar before a person could see the time. Well, then a prosecution for perjury was instituted by the present defendant against the plaintiff for having said that he saw what the time was by the clock. The prosecution ended in an acquittal, and now the present plaintiff brings an action for damages for malicious prosecution. In order to succeed in his action it is necessary for him to prove that he was acquitted; he must also prove malice, and the want of reasonable and probable cause for instituting the prosecution. As to his innocence, the acquittal is sufficient proof of that. As to malice, I think that there is proof of malice in the present case. I think the conduct of the defendant has shown some degree of malice, more especially his conduct in speaking privately to one of the jurors who had been summoned to serve at the trial, and pointing out to him the position in which the parties had stood. I think it was a most improper thing on the part of the defendant in having this private communication with one of the jurors, and I think that this communication itself showed such a degree of zeal on the part of the defendant to have the plaintiff convicted as would, in my opinion, amount to malice. Still there remains the question, was there reasonable and probable cause for a prosecution? I don't think it becomes absolutely necessary to say that both sets of witnesses are positively perjuring themselves. It is quite possible that Thacker and the other witnesses for the plaintiff may be satisfied in their own minds, and may be speaking the truth when they say that Hopewell went a yard and a half or two yards into the bar, and yet it seems to me possible and quite probable in fact that the defendant had not seen that, and that he honestly believed that the man had not entered the bar. Now

when the case of the prosecution of the present plaintiff came on, naturally the prisoner would have the full benefit of any doubt. So now when the then prisoner becomes the plaintiff for the purpose of suing for damages for malicious prosecution, the onus lies upon the plaintiff to prove a want of reasonable and probable cause for prosecution, and if there is a doubt on the part of the Court, then the present defendant ought to have the benefit of the doubt. I entertain a considerable degree of doubt myself, but my brethren are satisfied that the defendant believed that the plaintiff had not entered the bar. This is simply a question of fact, and being decided in favour of the defendant, I think he ought to have judgment in his favour, if he believed that there was reasonable and probable cause for the prosecution; and, moreover, he was supported in his belief by several impartial and independent witnesses. I leave out his wife's evidence and that of one or two other witnesses, but there are other witnesses who seem to me to have no interest whatever in the matter, and they were perfectly satisfied that the plaintiff had not entered the bar, but stood at the door or outside, and they state that if he had gone into the bar they must have seen him. Now supposing these witnesses are prosecuted for perjury, I am satisfied that no jury in the world would convict them. It is the wilfulness of the falsehood which would be the essence of the perjury, and in the same way the belief of the defendant is a very important matter. If there was this belief on his part that the plaintiff did not enter the bar, and if we find, moreover, that the defendant is supported in his belief by the evidence of several impartial witnesses it is impossible, in my opinion, to hold that there is a want of reasonable and probable cause. On this point then the plaintiff has failed in giving the necessary proof for the purposes of the present case. Upon the question of costs we should wish to hear Mr. Searle, but I have such a strong opinion about the defendant's conduct in trying, I might almost say, to tamper with the jury who had to try the case, that I am quite prepared in this case to depart from the ordinary rule that the successful party should have his costs, and I should be prepared to hold that the verdict for the defendant should be without costs.

Mr. Justice Buchanan concurred. He said that in this case, if the defendant had not reasonable and probable cause for the prosecution, he would be quite prepared to believe that there was malice, but he thought that the defendant had good grounds for his belief, and he was supported in that by the evidence of witnesses.

Mr. Justice Maasdorp concurred.

Mr. Searle having argued further on the question of costs,

The Chief Justice said: The evidence on the subject of seeing the clock forms a very small portion of the evidence for the prosecution under the Liquor Licensing Act, and after what I have heard of the evidence yesterday I am satisfied that the conviction was a very proper one. The only point upon which this case now hinges is the question of the clock. Did the plaintiff see the clock? And then comes the question, did the defendant himself believe that the plaintiff could not see the clock? I confess for myself I am not satisfied that he believes that the plaintiff did not see the clock, but my brethren are satisfied on that point, and when once they were satisfied on that point it was not necessary to go much further, because if he did believe this there was reasonable and probable cause for prosecution. But the the main reason why the costs are withheld is the flagrant impropriety of the defendant's conduct, and I think that the Court ought in some way to mark its sense of disapproval. The defendant ought to have known that it was his duty to abstain from speaking to any juror, and to bias his mind by privately pointing out to him where the plaintiff stood, and therefore I think that the Court ought to mark its sense of disapproval of the defendant's conduct by withholding from him his costs. Judgment for the defendant, but no order as to costs.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

SIMMS V. DE SMIDT. { 1896. Nov. 27th.

Partnership—Accounts.

This was a claim for £18 4s. 11d. for a debt alleged to be due by the defendant to the plaintiff for his share in the profits of a partner-

ship, and further for £20 for work done by the plaintiff for the defendant. Defendant tendered £5 in satisfaction of the claim.

The plaintiff's declaration alleged:

1. The parties to this suit are Government land surveyors. The plaintiff resides at Observatory-road and the defendant at Rondebosch, in the Cape Division.

2. In the year 1892 the plaintiff and the defendant entered into partnership as land surveyors in Cape Town, and it was agreed between them that in survey work the plaintiff should receive one-third share of the profits and that he should receive two-thirds of the profits when the defendant was engaged professionally beyond the limits of the Cape Division. It was agreed further that the books of the firm should be kept by the plaintiff.

3. On the dissolution of the partnership in or about the month of July, 1894, there was a balance in the plaintiff's favour on accounts being stated between the parties of £18 4s. 11d., exclusive of his share of moneys due on outstanding accounts.

4. There is also due to the plaintiff in respect of the survey of certain lots of ground at Woodstock, the property of one Welch (which survey was completed by the plaintiff while the partnership existed) the sum of £20, being the the plaintiff's share of the profits on the said survey. The said sum of £20 was not included in the accounts referred to in the last paragraph.

5. All things have happened, all conditions have been fulfilled, and all times have elapsed to entitle the plaintiff to payment of the said sums of £18 4s. 11d. and £20, and further to an account of the outstanding debts collected by defendant, but the defendant though frequently requested refuses to pay the plaintiff the said sums of £18 4s. 11d. and £20, or to render an account of the outstanding debts collected by him.

Wherefore the plaintiff claims:

(*a*) Judgment for the sum of £38 4s. 11d. with interest *a tempore moræ*.

(*b*) That the defendant may be ordered to render forthwith a true and correct account of all moneys received by him on account of the outstanding debts due to the late partnership, and to pay the plaintiff such amount as may be found to be due to him.

(*c*) Alternative or general relief.

(*d*) Costs of suit.

The defendant's plea and claim in reconvention set forth:

For a plea to the declaration the defendant says as follows:

1. As to the first paragraph, he denies that the plaintiff resides at Observatory-road; he says that the plaintiff resides and is domiciled at Bulawayo, which is outside the boundaries of this colony. But he admits the other allegations in the said paragraph.

2. He does not admit the second paragraph. In or about the year 1892 he entered into a contract with the plaintiff in terms of which the latter agreed to assist him in his land-surveying work in Cape Town and the Cape Division. In terms of the said contract the plaintiff was to receive one-third share of the profits received in respect of any work done while the defendant was practising his profession in Cape Town or the Cape Division, and two-thirds share of the profits received in respect of work while the defendant was professionally or otherwise engaged beyond the limits of the said division. It was further specially agreed that proper books showing the charges for professional work done within the limits of the Cape Division and the payments received from time to time should be kept by the plaintiff. The defendant denies that the contract aforesaid amounted to a contract of partnership between the parties.

3. As to the third paragraph he says that the agreement between himself and the plaintiff was terminated about the end of July, 1894, but he denies that at that date there was due to the plaintiff the sum of £18 4s. 11d. exclusive of his share of outstandings, or that any sum at all was due to him.

4. The plaintiff wrongfully failed and neglected to keep proper books showing the transactions aforesaid and showing the amount of outstandings due at the date of the termination of the contract: yet he wrongfully collected certain outstandings after the said date, and certain other outstandings were received by him at Bulawayo, to which place he proceeded shortly after the termination of the contract aforesaid. The defendant did collect certain outstandings after the termination of the contract, but of these he has duly rendered an account to the plaintiff.

5. The plaintiff did not render to the defendant, as it was his duty to do, a due and proper account of the transactions between the parties, and after his departure as aforesaid it was impossible from the entries made by him in the books to frame an accurate account. But the defendant, from the said entries and on the basis of certain statements rendered by the plaintiff, caused an account to be framed by an accountant, from which it appeared that,

allowing for all outstandings received by both parties, there was due to the plaintiff the sum of £2 15s. 10d, or thereabouts.

6. Before action brought, the defendant tendered to the plaintiff the sum of £3, he has always since been willing, and is still willing and ready to pay the said amount.

7. As to the fourth paragraph, the defendant admits that he agreed with the plaintiff that his share of the profits of the survey therein referred to should be £20. But the defendant has not yet received payment for the said survey, and the said Welch refuses to settle the account for the same on the ground that the plaintiff informed him that certain items therein would be remitted. Subject to the above he denies the allegations in the said fourth paragraph.

8. Save that he admits his refusal to comply with the plaintiff's demands, he denies all the allegations in the said fifth paragraph.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

For a claim in reconvention,

The defendant says as follows:

1. He asks leave to refer this Honourable Court to the matters set forth in his plea.

2. It was made the duty of the plaintiff to keep proper books of the transactions aforesaid, and it became and is his duty to render a due and proper account, supported by vouchers of all moneys received by him during the existence of the said contract, and also of all outstandings collected by him thereafter. Yet he has wholly failed to render such an account, though requested to do so.

3. By reason of the plaintiff's failure to keep proper books as aforesaid, the defendant was compelled to employ a professional accountant to investigate the state of accounts between the parties, and he was put to expense and suffered damage in the sum of £25.

The defendant claims:

(*a*) An order compelling plaintiff forthwith to render a true and proper account, supported by vouchers of all moneys received by him as aforesaid since the year 1892.

(*b*) Payment of the sum of £25 for damages aforesaid.

(*c*) Alternative relief.

(*d*) Costs of suit.

The plaintiff's replication and plea to the defendant's claim in reconvention were as follows:

For a replication to the defendant's plea the plaintiff says as follows:

1. At the date of the filing of the declaration the plaintiff resided at Observatory-road but he admits that he now resides at Bulawayo.

2. At the dissolution of the partnership existing between the plaintiff and defendant there was a balance due to the plaintiff of £5 18s. 2d. and subsequently, owing to the collection of certain outstandings, the balance due to the plaintiff was increased to £18 4s. 11d.

3. He admits that he collected certain outstandings after the date of the dissolution of the partnership, and he admits that he received certain outstandings at Bulawayo, but he denies that the said collection and receipts of outstandings was wrongful, and says he has duly rendered an account thereof to the defendant.

4. He admits the tender of the sum of £2 10s. 10d., and says the said tender was insufficient.

5. Save as above, and save in so far as the said plea admits any of the allegations of fact and conclusions of law in the said plea contained, he joins issue thereon with the defendant and again as before prays for judgment with costs.

And for plea to the claim in reconvention the plaintiff says:

1. He craves leave to refer this Honourable Court to the matters set forth in his declaration and replication.

2. He denies the allegations in paragraphs 1 and 2. He says that he did keep proper books of the transactions referred to in paragraph 2 of the claim in reconvention, and has rendered a true and proper account of all moneys received by him during the existence of the partnership and of all outstandings collected by him thereafter.

Wherefore he prays that the defendant's claim may be dismissed with costs.

The defendant's rejoinder and replication in reconvention set forth:

For a rejoinder to the plaintiff's replication, the defendant says that save as to any admissions therein contained he joins issue with the plaintiff upon the said replication, and again prays that his claim may be dismissed with costs.

For a replication to the plea of the defendant in reconvention, the plaintiff in reconvention says:

That save in so far as the said plea admits any of the allegations in the claim in reconvention, he joins issue with defendant in reconvention upon the said plea and again prays for judgment with costs.

Upon these pleadings issue was joined.

Mr. Graham (with whom was Mr. Buchanan) appeared for the plaintiff.

Mr. Innes, Q.C. (with whom was Mr. Benjamin), appeared for the defendant.

Alexander Simms, a Government land surveyor, said he lived at Observatory-road. In February, 1892, he entered into an arrangement with the defendant of the nature of a partnership. The defendant had an office, and they worked together under the style of De Smidt & Simms. The partnership lasted until July, 1894, and he continued keeping a book which he found on the office table, and carried on the same system of accounts. Witness handed the defendant from time to time three statements of the accounts of the partnership, dated September, 1893, May, 1894, and July, 1894, which were absolutely correct. The defendant had written to him concerning the accounts, both during the partnership and since. At the dissolution of the partnership in July, 1894, the account showed that there was £5 18s. due to witness. An account was also submitted to witness by the defendant which was incorrect, and contained several mistakes, the amounts in dispute between the parties being £16 4s. 4d. When he first joined the partnership nothing was said about rent, but on their removing from the Parade to new offices in Wale-street, the defendant suggested that witness should pay one-third of the rent, to which he immediately agreed. Before leaving Bulawayo he had made many endeavours to have the matter settled by arbitration. He also claimed £20 for a survey made in connection with the subdivision of certain property for Mr. Welch at Woodstock.

Cross-examined: The partnership was dissolved in all friendliness, and the friction that subsequently arose came about after he had put his case into the hands of his friend Mr. Power. The account book which he had kept for the partnership had no dates showing when fees were paid.

John Power, assistant astronomer at the Royal Observatory, said that he was familiar with the terms of the partnership which were, however, not adhered to. It was possible, from the book kept by the plaintiff, to make out a complete statement of account between the parties. He had tried to settle the matter by arbitration, and had suggested arbitrators.

Cross-examined: He was representing Mr. Simms here while the latter was in Bulawayo.

Thomas Nisbett Roberts, a Government land surveyor, said he had been in partnership with the defendant after the plaintiff, and was employed by Mr. De Smidt to make out an account.

For the defence Mr. Innes called the defendant, W. de Smidt, who said that during the partnership he himself kept no books, but left the accounts to Mr. Simms. Immediately after Mr. Simms left, he handed over all accounts to Messrs. Scanlen & Syfret for collection, and subsequently he advanced the sum of £40 to Mr. Power to send to the plaintiff, who was at Bulawayo. It was impossible from the book kept by the plaintiff, to make up any statement of accounts. He had refused to consent to arbitration, because he had been subjected to insult and abuse at the hands of Mr. Power and the plaintiff. He agreed to pay the plaintiff £20 for the survey work done at Woodstock for Mr. Welch, but the latter said that the plaintiff told him not to pay anything, and he (witness) had not recovered anything from Mr. Welch.

Cross-examined: He promised the plaintiff £20 in connection with the survey, but nothing was said as to the source from which the money should come. He denied that there ever was a partnership with the plaintiff, but contended that plaintiff was simply his assistant.

The Chief Justice said he could not see how the defendant could escape the payment of the £20, and it was a waste of time going on with the case.

After argument,

The Chief Justice gave judgment. He said: The main item in dispute in this case is the sum of £20, and the defendant has himself admitted that he agreed to pay this in consideration of work done, no condition having been mentioned. Then the defendant says that the plaintiff is in default for having discharged Welch. It is purely and simply a question of account. There is no counter-claim, and it is quite clear from the evidence that this £20 has been fairly earned by the plaintiff. Then it is said that Mr. De Smidt has had no benefit from the work, but I think it is quite clear from the evidence of Mr. Roberts that he has had the benefit of it, and Mr. De Smidt even now is not prepared to say that he has not received more than £20 in respect of Welch's work. He admits that it may have been £40 or £50. There is a tender of £3, and I think it is putting the case entirely in favour of the defendent if the Court gives judgment for £2. That will make £25 in all, for which amount judgment is given for the plaintiff with costs.

Mr. Justice Buchanan and Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton: Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

MIDLAND AGENCY AND TRUST COMPANY V. SMITH. } 1896. Nov. 30th.

Mr. Searle, Q.C., applied for final adjudication of defendant's estate.

Granted.

LANGERMAN V. C. W. BROWN.

Mr. Graham applied for final adjudication of defendant's estate.

Granted.

VERSTER V. BENT, ALIAS BENTLEY AND CO.

Mr. Close applied for final adjudication of the estate of the defendant firm.

Granted.

METELERKAMP V. ACKERMANN.

Mr. Close applied for provisional sentence on a mortgage bond for £500 and interest at the rate of 8 per cent. from January 1, 1888, and that the property be declared executable with costs.

Granted.

ILLIQUID ROLL.

ZEEDERBERG V. BLOEM AND BRILL.

Mr. Tredgold applied for judgment under Rule 329D, in default of appearance for £38 0s. 8d. and interest.

Defendant Bloem, who appeared in person, said he was too poor to employ an attorney, and that the defendant Brill had run away two years ago.

The Court allowed defendant two days in which to enter appearance.

COLONIAL GOVERNMENT V. CRICKMORE.

Mr. Sheil (Assistant Law Adviser) applied for judgment for the sum of £4 8s., Government dues.

Granted.

ADMISSION.

Mr. Sydney Samuel Jacobsohn was admitted a conveyancer on the application of Mr. Close.

REHABILITATION.

Mr. Tredgold applied for the rehabilitation of Herman Frans Albertus Klosser. The assets were valued in the schedules at £1,589 8s. 11d., and the liabilities £13,912 12s. 5d. When the estate came to be realised there was a deficiency of £11,522.

The Court refused the application. Leave to apply again in twelve months.

GENERAL MOTIONS.

IN THE MATTER OF THE MINOR PHILLIPSON.

Mr. Buchanan applied for the appointment of the minor's brother to assist him in the execution of articles of clerkship to an attorney in Cape Town, the minor's parents being dead, and their estates unrepresented.

The Court granted an order in terms of the application.

THE MUTUAL HALL COMPANY OF EAST LONDON.

Mr. Graham applied for an order in terms of the first and final report of the official liquidators. All the assets had been distributed, due publication had been made, and the books had been left open for inspection. There were thirty-three shareholders in the company, very few debts, and a considerable sum had been distributed.

The Court granted an order in terms of the application; books not to be destroyed until June 30 next.

STURK V. DIETERLE.

This was an application by the plaintiffs for the appointment of a commission to take the evidence of witnesses in Germany on their behalf in the trade-mark suit between the parties.

Mr. Searle, Q.C., for the applicant.

Mr. J. Rose-Innes, Q.C., for the respondent.

After argument,

The Court ordered the application to stand over until Thursday; costs of the present application to be paid by applicants.

THE PETITION OF THE DUTCH REFORMED CHURCH, DORDRECHT, AND JOHANNES C. THERON.

Mr. Searle, Q.C., applied to make absolute the rule *nisi* for cancellation of the deed of transfer passed in favour of John F. Woodward on the 6th of May, 1858, of certain erf, No. 16, in the village of Dordrecht, he

having abandoned the same, and the said church consistory having sold it to the said Johannes C. Theron.

The Court ordered the rule to be made absolute upon the production to the Registrar of proof of publication.

THE WESTERN PROVINCE BANK.

Mr. J. Rose-Innes, Q.C., applied for an order in terms of the report of the official liquidators.

The Court made the following order: To confirm the compromise, to dissolve the bank, to order the destruction of the books, accounts, and documents on or after June 30, to allow the liquidators to retain the balance of a sum of £256 after paying expenses, and directed that the amount due to the shareholders but unclaimed be paid into the Guardians' Fund.

THE PETITION OF WILLIAM SCHREIBER.

Mr. J. Rose-Innes applied for extension to the 12th January next of the rule *nisi* for an interdict restraining Frank J. Ludington from transferring or assigning letters patent in respect of a cigarette-making machine to any person other than petitioner, and restraining the registration of such assignment pending an action by the petitioner.

The Court granted an order in terms of the application.

THE PETITION OF WILLEM J. SMIT.

Mr. Graham applied for leave to sue *in forma pauperis* in an action against the executrix testamentary of the estate of petitioner's father, for transfer of one-half share of the farm Stofkraal, situate in the district of Fraserburg, alleged to have been bequeathed to petitioner and Jacobus H. Smit.

The Court granted the application. Mr. Graham to take the reference.

COLONIAL GOVERNMENT V. NOLTZYKOP GOLD-MINING COMPANY.

Mr. Sheil applied to make absolute the rule *nisi* restraining the respondents from removing any mining machinery or other movable assets from certain claims held by them under the Colonial Government, until the licence money due thereon has been paid.

The Court granted an order in terms of the application.

CLEENWERCK V. CLEENWERCK.

This was an action for divorce brought by the husband by reason of the adultery of his wife. The parties were married at Rosebank on July 19, 1893.

Mr. Close appeared for the plaintiff.

Reginald Douglas Barry, clerk in the Colonial Office, produced the register, and proved the marriage of the parties at Rosebank on July 19, 1893.

John George Cleenwerck said the defendant was his wife. They were married at Rosebank on July 19, 1893. The photograph produced was that of his wife. He was employed on the Cape Government Railways. He had been ill nine months, and during that time he lived on allowances made by two friendly societies. His wife became discontented during the latter part of last year. She wanted dresses and things witness said could not be afforded. She left the house on January 8, supposed to go to an aunt's. She returned on the night of the 9th January, and when asked where she had been, she said it was her business. She afterwards said she was going to Johannesburg, and she went away on January 10. He had since been told that she had been living in a brothel in Sydney-street, and had seen her there on January 13 last. She refused to return to witness.

Mrs. Jacobs Sparse said she lived in Sydney-street. She knew the woman whose photograph was produced. That woman had lived in her house in Sydney-street with a man. The house was a brothel.

The Court granted a decree of divorce.

VAN DER VYVER V. DEARY. { 1896. Nov. 30th. Dec. 2nd.

Malicious arrest—Reasonable and probable cause—Departure from Colony.

An affidavit for the arrest of a debtor under the 8th Rule of Court should fairly state the facts upon which the deponent bases his belief that the debtor is about to remove, or is making preparations to remove from the Colony.

Any concealment of such material facts as might have induced the Registrar to withhold the writ is evidence of malice as well as of want of reasonable and probable cause in an action for malicious arrest brought by a debtor who proves that he did not intend to depart from the Colony without paying the debt.

This was an action brought by the plaintiff Stephanus van der Vyver, a farmer, residing in the division of Aliwal North, against the defendant, Noah Dallaway Deary, for £500 damages for unlawful arrest.

The plaintiff's declaration was as follows:

1. The plaintiff is a farmer residing at the farm Dankfontein, in the division of Aliwal North. The defendant is a general merchant, residing at Molteno in the division of Albert.

2. In or about July, 1896, the plaintiff was indebted to the defendant in the sum of £31 8s. 6d. for goods sold.

3. On or about July 24, 1896, the defendant caused a writ of arrest to be issued by the Assistant Resident Magistrate of Aliwal North to arrest the plaintiff.

4. The said writ was issued upon an affidavit made by defendant stating *inter alia* that the plaintiff was making preparations to leave the Cape Colony, and intended to leave the Colony for good without paying the said debt: the said statements were false and were made maliciously and without reasonable and probable cause.

5. Upon the writ of arrest being presented to the plaintiff he pointed out sufficient property to discharge the said debt, and offered to give security for a much larger sum than the amount of the said debt, but the defendant refused to accept same.

6. Thereupon, on or about 27th July, the plaintiff was lodged in gaol at Aliwal North but was subsequently released.

7. The arrest of the plaintiff and his imprisonment in gaol as aforesaid were illegal, malicious, and without reasonable and probable cause, and the plaintiff has thereby suffered indignities and injuries and received damages to the extent of £500.

The plaintiff claims:

(*a*) The sum of £500 as damages.

(*b*) Alternative relief.

(*c*) Costs of suit.

The defendant's plea set forth:

1. The defendant admits the allegations in paragraphs 1, 2, 3, and 6 of the declaration, and denies those in paragraphs 5 and 7.

2. As to paragraph 4 he admits that the writ therein referred to was issued upon an affidavit made by him, and he annexes hereunto a copy of the said affidavit, the allegations of fact wherein are true, and which he says was made by him truly and without malice, and with reasonable and probable cause for his belief that the plaintiff (in the said affidavit referred to as 'defendant') was making preparations soon to leave the Colony for the South African Republic.

3. Save as aforesaid, he denies the allegations in paragraph 4 of the declaration.

4. He says that before the said writ was issued the plaintiff stated in the presence of one Gustav van Broembsen, and also to others that he was about to leave the Colony; and further says that the plaintiff was making such preparations, and thereafter admitted that he had informed several persons of his intention to leave this colony.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The affidavit referred to above was as follows

I, Noah Dallaway Deary, of Molteno, Cape Colony, make oath and say:

1. That the above defendant is indebted to me in the sum of thirty-one pounds eight shillings and sixpence (£31 8s. 6d.) sterling, being the balance of amount for goods and merchandise and interest, sold and delivered as per account hereunto annexed and marked "A."

2. That the said defendant is making preparations to leave the Colony for the South African Republic, he having told some people that he would leave for the said Republic some time next week, and I verily believe that the said defendant is going to leave the Colony for good.

3. That I have repeatedly by letter and through my attorney made application to the defendant for payment of the account, but without success; and I verily believe that he does not intend to pay me, and that unless he is arrested he will leave the Colony without paying me.

4. That I have no pledge or security for the said amount due as aforesaid, or for any part thereof, and that the said amount remains wholly unsecured to me.

5. That I base my belief as to the intended departure of the said defendant partly on a certain telegram received yesterday by me from one Gustav van Broembsen, of Jamestown, district Aliwal North, and which telegram is hereunto annexed, marked "B."

(Sgd.) N. D. DEARY.

Sworn at Molteno, this 21st day of July, 1896.

Before me, R. B. Badnall, J.P.

Annexure A was a detailed account of goods bought by defendant from plaintiff.

Annexure B (copy of the telegram) was as follows:

"Molteno, July 21.

"From Gustav, to Deary, Molteno.

"Old Van der Vyver leaves here next week for Johannesburg."

The replication was general.

On these pleadings issue was joined.

Mr. Searle, Q.C., with whom was Mr. Sheil, for plaintiff; Mr. Schreiner, Q.C., with whom was Mr. Buchanan, for defendant.

Lourenz Stephan van der Vyver, the plaintiff, said he had lived on his farm in the district of Aliwal North since June. Last year he lived in the Burghersdorp district. Witness knew the defendant at that time. Defendant kept a shop in Molteno, and was a general merchant. Witness had dealt with defendant since 1892. Sometimes he bought small articles elsewhere. Defendant used to take his produce. Witness left Burghersdorp district in June, 1895. Before he left he saw defendant, who bought some wool from him in April, 1895. Witness then told defendant he was going to leave his farm Stormfontein. Defendant said nothing. At that date he owed defendant about £28. Witness went first to a place not far from Jamestown, the farm Witkop. He came to the Aliwal North district last May. Witness told Mr. Deary's clerk where he (witness) was going. Subsequently witness received the letter produced from defendant, asking for payment. Witness came into Jamestown on July 23 last and saw defendant's clerk, Van Broembsen, and a document of pledge was written out. Sixteen oxen, value £4 10s. each, were mentioned. The document was drawn up by Mr. Kidwell, and sent to the defendant. Witness owed Kidwell £11, and the document was as security for this debt as well as that due to defendant. At that time he had no idea of going to Johannesburg without paying his debts, and had never told anybody he would do so. Mr. Kidwell told him to come again on the following Tuesday. On the Monday the Messenger of the Court, Mr. McLeod, came to him, and said witness must pay the money or be arrested. Witness said he had no money, but he had value, and witness then sent for eight oxen and a wagon. Mr. McLeod estimated the oxen at £4 each and the wagon £30, and recommended witness to go to a law agent. Witness went in to Aliwal North with the messenger. He was about five hours away. Witness got to Aliwal on a Tuesday about half past eleven o'clock, They went to the office of Mr. Schweizer, and Mr. Hopley, the manager there, took particulars of what witness offered as security for the debt. Mr. Hopley said he would send a telegram to the defendant at Burghersdorp. In the evening Mr. Hopley came with a paper for witness to sign. Mr. Osborne said, "No, he can't sign it; it's a mistake. You must wait until morning.' They then locked him up in gaol. Witness was willing to sign the document that night. Witness was released the next morning. They took away his pipe, tobacco, and all he had upon him. They did not give him any food. They put him with the convicts in the yard who were breaking stones. He did not get out until afternoon. Witness was angry because of this treatment. Afterwards he signed a document making over eight oxen, a wagon, and a riding horse. These animals and the wagon were handed over to Mrs. Swanepool as a pledge. Witness afterwards paid the money and took back the pledge. The horse, however, died.

Cross-examined: The account went back to June, 1894. Witness last saw the defendant in April, 1895, when he paid something on account of his debt and took further credit. He did not reply to the letter of June 24; he went about to look for money. After leaving the gaol Messrs. N. E. Smuts & Co. paid the defendant's claim, and plaintiff gave that firm a promissory note for the money. The cattle were at the farm. Six of the oxen belonged to his son, who was a minor.

Re-examined: He had no intention of going to Johannesburg for good; only for six or eight months. He was going to sell stock so that he could pay his debts. He afterwards gave up the idea of going away. His son was eighteen years of age, and witness had got his consent to the sale of the oxen that belonged to him.

Alex. Jas. Kidwell, law agent and auctioneer, Jamestown: On July 22 last Mr. Van Broembsen came to him with a telegram from the defendant, and asked how he should act. Witness gave him instructions. Afterwards Van Broembsen said he was satisfied that plaintiff was not going to leave the Colony. Then defendant offered sixteen oxen and a wagon as security. Witness thought the sixteen oxen ample security both for the money owing to the defendant and to himself, and drew up the deed produced. Plaintiff was willing to hand over the oxen immediately. Witness told plaintiff to call again on Tuesday. Witness afterwards wrote to plaintiff, sending the deed and stating that the security was ample. This letter defendant ought to get on the 24th. Witness heard again from the defendant on Tuesday, July 28. Witness had always found plaintiff an honest, hard-working man.

Cross-examined: Witness was not acting agent for the plaintiff. Plaintiff had asked witness to lend him money to pay the debt due to defendant.

Peter Willem Labuschagne, farmer, of the district of Aliwal North, a neighbour of plaintiff, said he knew the wagon and oxen belonging to plaintiff. The oxen were worth £4 each and the wagon £30. Plaintiff came to witness in June, in connection with lending him money, which he was unable to do.

This closed the plaintiff's case. For the defence,

G. H. Deary, the defendant, said he was a merchant residing at Molteno. He had been in business about four years. He knew the plaintiff, and had known him about three years. From June, 1894, an account of the plaintiff's stood open. At that time he had a small account, and took further credit to the extent of £5 11s. 7d. He said he would come in shortly and pay up. He never did so. Witness rendered accounts several times to the various addresses at which the plaintiff had lived. The first time he heard of the whereabouts of plaintiff was through Van Broembsen. Witness never had any reply to his demands, nor did anyone see witness on plaintiff's behalf. Witness was not satisfied with the security subsequently offered by the plaintiff, and left the matter in Schweizer's hands. Witness afterwards got paid. He had no animosity against the plaintiff. He had sustained losses through the people running over the border.

Cross-examined: When witness drew up the affidavit on which plaintiff was arrested he had nothing before him but a telegram from Van Broembsen. The agent said that it must have been said that plaintiff was going to leave the Colony. The statement that he verily believed plaintiff was going to leave the Colony was based only upon Van Broembsen's telegram. He left the matter in the affidavit to his attorney to draw up. He did not get the letter from Kidwell until the 25th. He answered that letter on the 25th. Witness had great confidence in Van Broembsen. Up to the time plaintiff wanted to run up a bigger account witness thought him an honest man. Witness used to buy his produce.

By the Court: He could not say when he first heard from Schweizer as to the plaintiff being arrested. The only thing he acted upon was the telegram from Van Broembsen, stating that plaintiff intended to leave for Johannesburg. He did not wholly believe in Kidwell's statement that plaintiff did not intend to leave, as people up there had got into the habit of clearing over the border.

G. A. van Broembsen, general dealer, Jamestown, gave corroborative evidence. He knew that plaintiff was in the district, and he thought he would let defendant know. This was on July 22. At 5.59 p.m. on that day he sent the second wire: "Kidwell has the affair in hand, and will secure you." Plaintiff did not possess much property, and he lived with his family in a little hired place for which he paid £19 a year.

Cross-examined: Plaintiff did not owe witness any money; therefore he did not think whether or not plaintiff intended to go to Johannesburg. When witness sent the second telegram he did not think there was any need to arrest the plaintiff.

This closed defendant's case.

Mr. Searle, Q.C., for plaintiff: Anyone who arrests another does it at his risk. Such an affidavit as was made in this case (telegraphed without being supported by proper details) would not in this Court be considered sufficient to warrant the issue of a writ. See *Jackson* v. *Somerville* (8 J., 160). Moreover the affidavit was incorrect. Deary received confidential telegrams from Van Broembsen (in whom he had ample confidence), upon which he initiated arrest proceedings. In spite of a further telegram from Van Broembsen, saying that arrest was unnecessary, Deary had the writ of arrest taken out. Then the defendant received information from Kidwell that plaintiff was not going away, and instead of taking steps to stay the writ, defendant said, "The matter is in Schweizer's hands and I will not interfere." He is responsible for all the consequences of the arrest. It is clear from the evidence that the plaintiff had no intention of going away or of defrauding the defendant. [The Registrar in reply to the Court said that he *would* issue a writ under such circumstances as existed in this case.] In any case the point is that if a man finds his affidavit on which the writ was granted is incorrect he is liable for not taking steps upon new information and rectifying the proceedings, as is his duty. *Fraser* v. *Sievewright* (3 J., 342); *Pullinger* v. *Harvant* (2 G. 111). As to reasonable and probable cause, see *Spiegel* v. *Miller* (1 Juta, 261). See also *Adler* v. *Friedlander* (1 Juta, 263); *Erasmus* v. *Brett* (3 Ros. 160).

Mr. Schreiner, Q.C., for defendant: This is an arrest under Rule 8, have the requirements of the rule been complied with? The rule requires two things:

1. A direct and positive averment—therefore an arrest often cannot be based on telegraphic statements from agents on behalf of a principal made by affidavit. *Tritz* v. *Davis* (Buch. 79, p. 76).

2. As to the remainder of the rule it contemplates "reasonable and probable information": *i.e.*, it requires only that the grounds of belief be stated. The grounds on which the belief is based must be given. *Dows* v. *Irving & Co.* (3 E.D.C., 184); *Hudson* v. *Rodgers* (3 E.D.C., 400). A telegram received from somebody else is surely sufficient ground for acting. This is one of the very cases the rule is framed to meet; the grounds in such a case as this are surely reasonable; the person arresting does not require as principal an affidavit from the person on

whose information he acts. The arrest is in perfect order surely so far as regards Rule 8. It was not originally informal. The only other case plaintiff could make is one in which he must amply prove: (*a*) Malice and (*b*) want of reasonable and proper cause as essentials. The Court as a jury must be satisfied on that. Now surely the letter from Kidwell is not such a letter as would bind defendant to act in any other way than he did. Kidwell assures defendant that the plaintiff is not going. Defendant is not bound to take plaintiff's paper security (as to which indeed some of the oxen offered prove not to be his but his sons). True Van Broembsen wired later not to go on with the writ, as a summons would do. But the distinction is to be made that defendant would be justified in accepting Van Broembsen as an authority on the *fact* that plaintiff was leaving but was justified in refusing to accept his statement on a question of legal *advice*. Deary was only doing what a vigilant and active creditor does and should do. Nothing in his conduct shows malice. The plaintiff must therefore show that Rule 8 has been complied with, which he surely has not done, and if he fails in this he must show that there was malice and want of reasonable cause. *Addison on Torts* (page 159) shows that even if plaintiff did not intend to go (though he actually did say he was going) defendant is not liable under the circumstances of such a case as this.

Postea (December 1st).

The Chief Justice, referring to this case, said: A telegram has been received from Mr. Schweizer stating that he sent a letter to Mr Kidwell informing him of the issue of the writ. The letter was written on the 24th of the month, and was probably posted that night, so I suppose it would reach Molteno on July 25.

Mr. Schreiner: That is so, my lord.

The Chief Justice: The probabilities are that the defendant would be informed of that fact. Judgment will be delivered to-morrow morning.

Postea (December 2nd).

The Chief Justice said: This is an action for damages for malicious arrest. The arrest took place under the following circumstances. The defendant, who was living at Molteno, received a telegram from Van Broembsen, who had formerly been his confidential clerk and now lived at Jamestown, in these terms: "Old Van der Vyver leaves next week for Johannesburg." He therefore telegraphed to his attorney at Aliwal North as follows: "Received telegram to-day. Van der Vyver leaves Jamestown next week for Johannesburg. If you have my case in hand from Andrews please take steps to stop and imprison." Schweizer replied: "Send power and affidavit to arrest immediately." Thereupon the defendant had an affidavit prepared in which it is said, *inter alia*, that the plaintiff had told some people of his intention to leave for Johannesburg, that the defendant verily believed that the plaintiff would leave the Colony for good without paying his debt, and that he based his belief partly upon the telegram which he had received from Van Broembsen. That was certainly not a fair or ingenuous affidavit. The only information the defendant had was derived from Van Broembsen's affidavit, and yet he signed an affidavit stating that the plaintiff had informed some people of his intended departure and that the defendant's belief was partly based upon the affidavit. The inference is irresistible that there were other grounds for his belief which it was unnecessary to mention. If, as the Court has so often observed, it is necessary that an affidavit should fairly set forth the facts relied upon for obtaining ordinary relief, the necessity becomes still greater where the liberty of the subject is at stake. An affidavit for the arrest of a debtor under the 8th Rule of Court should fairly state the facts upon which the deponent bases his belief that the debtor is about to remove, or is making preparations to remove, from the Colony. The affidavit, no doubt, was prepared for the defendant by his attorney, at Molteno, but he must have read and understood it before he signed it. He was annoyed by the plaintiff's failure to answer repeated applications for the money, but this failure is explained by the plaintiff's frequent changes of residence, which may have prevented the letters from reaching him. Be this at it may, after the defendant had sent his affidavit he seems to have been asked by his Aliwal North attorney for an affidavit from Van Broembsen in support of the original statement that the plaintiff intended to leave the Colony. He accordingly telegraphed to that effect to Van Broembsen, and the immediate reply was: "Affidavit unnecessary, summons will answer better." At that time the writ had not been issued, and I hold a decided opinion that the defendant ought to have informed his attorney of Van Broembsen's advice and unwillingness to make the required affidavit. He concealed a material fact the knowledge of which might have prevented Schweizer from applying for the writ and would certainly have induced the clerk not to issue it. The concealment of such a material fact is evidence, in addition to that furnished by the form of affidavit, of malice as well as of absence of reasonable and probable cause. In fact the plaintiff did not intend to leave the

Colony without paying his debts. He made an arrangement with his agent, Kidwell, an agent at Jamestown, for the payment of the debt, and of this arrangement Kidwell informed the defendant, after the writ had been issued but before it had been put into execution. Kidwell at the same time informed the defendant that the plaintiff did not intend to leave the Colony, but the reply was that the writ had been issued and the matter was in the attorney's hands. Even then the defendant might have prevented the arrest but, acting in the furtherance of his own interests and without regard to the plaintiff's rights, he insisted upon the execution of the writ. The plaintiff having been imprisoned in the gaol for a night is entitled to some damages, but this is not a case for exemplary damages. The debt was long overdue and the defendant's frequent applications for payment had not been taken notice of. The defendant had reason for his annoyance but not for his conduct after he had received further information from Jamestown, and the judgment must be for the plaintiff for £15 damages and costs.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

IN THE MATTER OF THE MINORS VAN DER MERWE. 1896. Dec. 1st.

Mr. Sheil (Assistant Law Adviser) applied for an order authorising the petitioner to sell a certain farm for the sum of £5,500, and to authorise him to sign the necessary documents.

The Court granted an order in terms of the prayer.

PIRIE V. PIRIE.

Mr. Close applied for an extension to the 12th January of the return day of a rule *nisi* granted on the 2nd November last, calling upon the respondent to show cause why applicant should not be allowed to sue *in forma pauperis* for divorce.

The Court granted the application.

VAN AS V. NEL AND NEL'S EXECUTORS. 1896. Dec. 1st.

Donation—Registration—Consideration.

A donatio inter vivos, which has been accepted by the donee, but the subject matter of which has not been delivered to him, can only be enforced, as against the donor's executors, to the extent of £500, unless it has been duly registered.

This was an action brought by Anna Magdalena van As, a minor daughter of Cornelius F. van As (and assisted by him) against Jacobus Johannes Nel, and the executors of the estate of Anna M. Nel, for a true and proper account of all sums of money now in his hands belonging to her, and that he be ordered to pay over such sums into the Guardians' Fund on behalf of the plaintiff, and for alternative relief.

The plaintiff's declaration alleged:

1. The plaintiff is Anna Magdalena van As, a minor, residing at Floris Kraal in the Prince Albert division, and is duly assisted in this suit by her father and natural guardian, Cornelius Fredericus van As, who on or about the 15th June, 1896, obtained leave from this Honourable Court for the institution of this suit.

2. The defendant Jacobus Johannes Nel is a farmer residing at Drooge Weil in the said division, and is a brother of plaintiff's late mother, Engela Cornelia van As (born Nel), who died on or about July 15, 1889. The said defendant is sued individually and as executor testamentary in the estate of the late A. M. Nel, the defendant Petrus Johannes Nel is the executor in the said estate, and is sued in his capacity as such.

3. In or about 1893 the plaintiff's grandmother, named Anna Magdalena Nel, made a donation to the plaintiff of the sum of £1,£60 16s. 2d., and the said sum was delivered to the defendant, who received it on behalf of the plaintiff, and was instructed by the plaintiff's grandmother to deposit it with the Master of this Honourable Court on plaintiff's behalf.

4. The defendant failed so to do, and thereafter was instructed by his mother, the plaintiff's grandmother, to place the same in the Worcester branch of the African Banking Corporation on behalf of the plaintiff, and to pay the interest from time to time for her benefit, but the defendant failed and neglected to place the said sum in the plaintiff's name, but placed it in the said bank in the name of the estate of J. J. Nel.

5. On or about February 20, 1895, the defendant paid to the plaintiff's father on her behalf the sum of £40, as interest upon the said sum, but since the said date he has neglected and

refused to pay any further sum as interest, or to account for the same in any manner to the plaintiff, her father, or any one on her behalf.

6. In or about September, 1893, the said Anna M. Nel, plaintiff's grandmother, died.

7. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to claim from the defendant that he place the said sum of money in the Guardians' Fund on her behalf, or account for the same, together with the interest due thereon, in such manner as this Honourable Court may direct.

8. In the alternative the plaintiff submits that she is entitled to claim that the defendants, as executors testamentary in the estate of the late A. M. Nel, account to her for the proceeds of the said sum of money, £1,566 16s. 2d.

The plaintiff claims:

(*a*) That the first defendant be ordered to render a true and proper account of all sums of money now in his hands belonging to her, being the proceeds of the said donation, and to debate the same,

(*b*) That the defendant be ordered to pay over the said sums of money into the Guardians' Fund on behalf of the plaintiff.

(*c*) Such alternative relief as to this Honourable Court in the premises may seem meet.

(*d*) Costs of suit.

Or in the alternative, that the defendants in their capacity as executors testamentary in the estate of A. M. Nel be ordered to render a true and proper account of all sums of money due to the plaintiff and pay over the said sums to the Guardians' Fund on behalf of the plaintiff and to pay the costs of this suit.

The defendant's plea (as amended in court) set forth:

1. The defendant admit paragraphs 1, 2 and 6 of the declaration.

2. As to paragraph 3, the defendant specially denies that any such donation as is therein alleged was made and completed in favour of the plaintiff, or that he then or at any time received the sum of £1,560 on behalf of the plaintiff.

3. He says that in February, 1894, his mother gave him instructions to deposit the amount of £1,400 in the hands of the Master of the Supreme Court in trust for her; that during her lifetime she would receive the interest for the benefit of the said minor and that after his mother's death the Master should pay the capital to the plaintiff, her granddaughter.

4. The defendant got a draft and requested the Master to accept the said deposit subject to the trusts aforesaid, but the Master refused to accept the deposit.

5. Thereupon the defendant with the knowledge and approval of his mother deposited the money to her credit in Worcester branch of the African Banking Corporation.

6. Save as aforesaid, he denies the allegations in paragraphs 3, 4 and 7 of the declaration.

7. As to paragraph 5, he says that the sum of £40 referred to was not paid to plaintiff's father by way of interest due by him on the sum alleged to have been given to the plaintiff by her grandmother, but was paid by him pursuant to his mother's (the plaintiff's grandmother) instructions.

8. He admits that he refuses, but denies that he neglects to pay any sum whatever as interest upon the money deposited by him to the credit of his mother as aforesaid, and says specially that if the plaintiff has any just claim, which he does not admit, such claim must not lie against him but against his mother's estate.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On the pleadings issue was joined.

Mr Searle, Q.C. (with whom was Mr. Graham), for the plaintiff.

Mr. Schreiner, Q.C. (with whom was Mr. Maskew), for defendant.

Cornelius Fredericus van As said he had a daughter, aged nine, the plaintiff in this action. Witness resided in the district of Worcester, and was married to the daughter of the late J. J. Nel and Anna Magdalena Nel, who resided in the district of Prince Albert. Witness's wife died in July, 1889, and his father-in-law in March, 1890. Before his death he made a will, which was set aside by an order of th Court on the ground of defective execution. In consequence of that a very old will was proved by which his daughter got nothing. There were also two other heirs called De Wit, who took nothing. In the old will witness's mother-in-law was appointed the executrix. The defendant afterwards managed the affairs of witness's mother. Witness spoke to the old lady as to his daughter getting nothing. A sale of movables took place shortly after the old man's death. The old lady said it would be better to put in the old will, and she would provide for the child out of her half-share of the estate which was worth about £30,000. She said the amount the child lost she would pay out of her own pocket. The landed property was subsequently sold. Witness was present at the sale. After the sale witness again spoke to Mrs. Nel and told her he had heard she had a plan to give the child a farm. She said she would rather give the child money than a farm, and she would give her the same sum in money that the

others got out of the estate, and this money must be put into the bank. The child had as yet received nothing. He consulted an attorney, who wrote to the Master on his behalf. About December, 1893, witness again saw Mrs. Nel, when she confirmed what she had previously promised. She said his daughter was to receive as much as the others. The amount would come to £1,566 16s. 2d. Afterwards the defendant gave witness £40 as the interest on the money which his mother had given to the child. Witness was not satisfied with this.

Cross-examined: The letter signed by defendant for his mother, the executrix, was satisfactory to witness. He doubted whether defendant came to town to put £1,400 with the Master. Defendant told witness he had been to the Master to deposit the child's money, but did not name the sum.

Re-examined: He was satisfied with the promise in the letter, but when he did not get the money he was not satisfied. The old lady was very fond of the minor.

Theodore Chas. W. Johnson, an attorney practising at Ladismith, said he had the administration of J. J. Nel's estate. J. J. Nel died in 189', and the will of 1886 was set aside. He was acting for the executrix, and was satisfied the will could not be supported. Then the will of 1863 came in, under which three grandchildren—the two De Wits and the present minor—were excluded. The De Wits got farms from the old lady by arrangement. The purchase price of the farms was about £2,000, and the De Wits paid £598 as the difference between what the inheritance would have been and the price of the farms. It was a gift by the old lady, and transfer was passed. The value of the whole estate was about £30,000. The old lady's share was £15,000. The assets consisted of twelve or fourteen farms, live-stock, movables, promissory notes, and bonds. Witness made up the liquidation accounts in the estate. He thought the third account was filed in 1893. The £1,566 16s. 2d. was the amount of the inheritance due to each child under the liquidation account. There were ten children. Witness drew Mrs. Nel's will in November, 1893, on her instructions.

Cross-examined: Mrs. Nel wanted the child to live with her, but the father would not allow it. Mrs. Nel did not want Mr. Van As to get the handling of the money. Witness deposited the money with the Master under the condition that if the minor should die before the old lady, being a minor, the money was to revert to the other heirs. It was understood that if Mrs. Nel died first the minor was to have the money.

[At this stage the executors in the estate of the testatrix were joined as co-defendants in the action.]

Re-examined: Witness informed the defendant that the master would not accept the money in 1893. Defendant then said he would go to see the Master himself. Defendant was anxious to complete the security for the child.

Heinrich W. Becker, law agent at Ladismith, said he attended the meeting of the heirs in the estate of the late Mrs. Nel. He was acting for one Roux. The defendant was present. There was a talk about defendant's child having the money. Defendant submitted to the heirs a proposal for the sum of £1,566 to be paid to the minor out of Mrs. Nel's estate. Witness put certain questions to the defendant. Witness asked him whether he had instructions to deposit this money, and he said the Master would not accept it. Defendant then said he re-banked it and had paid Mr. Van As £40 interest on it. The estate appeared to be worth about £30,000. There were promissory notes owing to Mrs Nel by the heirs amounting to about £9,000. The notes had been destroyed, the old lady having made a present of the amounts to the heirs. The defendant's liability in this way was, he thought, about £2,300.

Cross-examined: Defendant said nothing at the meeting about £1,400; but the heirs were all willing that the daughter of Mr. Van As should have £1,566. Van As had had no money out of the estate.

David J. G. Conradie, of Laingsburg, lately a schoolmaster, said that he knew the defendant. He remembered in the early part of 1894 the defendant coming to see him. Defendant asked witness to write a new will for his mother. He told witness to leave out the legacy to the minor child, and said the two De Wits had been provided for. Defendant said he was going to deposit the money with the Master for the minor child.

Robert Watson, a qualified medical practitioner, residing at Ladismith: He was present when the movables in the estate of J. J. Nel were sold. Witness saw old Mrs. Nel there. There was talk about the last will being upset and as to the minor children being disinherited. Mrs. Nel said whatever happened she wanted the children to share alike. The De Wits were to get ground, and the old lady wanted the money paid in for the minor Van As. She wished them each to get the same amount. The De Wits were to owe other money to the estate, because the farms were more valuable than the amounts they expected to get.

Wm. Jas. McLeod, conveyancer and law agent, Laingsburg, said he was

present at the meeting of the heirs on March 10, 1896, representing Mr. Van As. Defendant told witness the Master would not accept the money, and said he had re-banked it. Defendant also said he had paid the £40 interest. Defendant was anxious the money should be paid.

John A. van der Vyver, farmer, said he had known old Mrs. Nel, who was his aunt. He remembered in the year 1894 talking to her, when she said she had told the defendant to put money into the bank for the child; a little more than £1,500. Mrs. Nel was very fond of the child.

Stephanus Fourie, one of the heirs in the estate, who married a daughter of the late J J. Nel, remembered Mrs. Nel saying that she had told defendant to place money away for the child of Mr. Van As. He had heard defendant say he had put the money in the bank.

Maria Burgher said she knew old Mrs. Nel, who told witness on October 22, 1894, that the money for the child of Van As was in the bank.

Thomas Penrose Peters, attorney, clerk with Messrs Van Zyl & Buissinné, said he remembered going to the Master's Office in 1892, when the Master said he would not accept the trust.

Robert Frederick Aling, accountant for the Worcester branch of the African Banking Corporation: There had been on fixed deposit in the name of J. J. Nel in the Worcester branch a sum of £1,400 on interest at 4 per cent. It was transferred in September, 1896, to the current account of Anna Magdalena Nel. The defendant, J. J. Nel, could operate on the current account.

This closed the evidence for the plaintiff.

For the defence,

Jacobus Hendrik Nel said he was the original defendant in the case, and one of the executors now joined as executors of the estate of his mother. He drew a draft on the Worcester branch of the African Banking Corporation, so that he might deposit the money with the Master, following out his mother's instructions. When the Master heard the conditions, he would not accept the trust. His mother's wish was that if the child should not attain majority, the money should revert to the other heirs to the estate. Afterwards he placed the amount in the bank on fixed deposit, and told his mother, who was satisfied. The money stood for a long time to the credit of the estate of his father, but he thought this was settled up. Mr. Johnson still had the matter in hand. Witness paid Mr. Van As £40. His mother told him to do so. He thought this was in February, 1894. Witness never told Van As that the money stood in the name of the child. His mother never instructed him to put the money in the name of the child.

Cross-examined: Witness drew the moneys out of the bank from time to time. £2,200 had been drawn out by him. His mother's estate was now about £3,000. The amount witness got was £1,566. Mrs. Nel was very anxious to secure the money to the child. Witness and Van As had always been friends, but not very good friends. The mother of witness was always fond of the child, and after the money was put in the bank she thought it was secured to the child. He had not yet filed any account in the estate, and he was quite willing to pay interest on what he had had.

By the Court: There were outstanding debts. His mother died in September, 1895.

Chief Justice: It is high time, I think, that you filed an account.

Cross examination continued: He had not been asked by the Master to file an account. Witness was a wealthy man, but was not much better off than the other heirs. Witness did not destroy promissory notes for £2,000 or £3,000 that he owed to his mother. His mother made him a present of £2,000 in 1893. He did not draw out £300 to build a dam: it was to buy a farm with.

By the Court: He did not think he was doing wrong by using the money of the estate and paying interest on it. His mother lived on a farm and farmed herself. She wanted the money he drew out during her life to put into the farm.

Mr. Searle argued that donation by the grandmother was complete as far as she was concerned

The Chief Justice: You need not go into the question of liability as executor. That is a question between Nel and the estate.

Mr. Schreiner: Nel cannot be personally liable on the pleadings as they stand. The plaintiffs say that he neglected to get the Master to take the custody of the money as arranged when the Master, in fact, refused to take it without an order of Court. They state that he was instructed to deposit in the Worcester Branch of the African Banking Corporation. As to this not a word of evidence was led. Defendant has no funds in his hands to account for. He did draw amounts but did so under power of attorney given by his mother. You cannot get an account from a man who has nothing in his hands—to whom there has been no delivery nor anything tantamount thereto. What have the witnesses done to show any bond of privity between plaintiff and defendant? What he has done he *may* be

liable for—but not to the present plaintiff, to the estate perhaps not to plaintiff. There is nothing to show clearly what the mother wished. Defendant is told by her to invest with the Master—he draws the money for that purpose, takes it to the Master, who refuses to accept it. He puts it back again where he drew it from. This is not an action for damages and breach of trust, nor have we prepared for that. We assert that our plea more than meets the declaration as drawn. Our client is not in any sense curator or trustee, he is nothing but an agent, and as an agent he has amply carried out his duty. If the Court holds there was a completed gift by the mother there may be sufficient delivery so as to bind the estate. But there was no registration in the Deeds Office—though there is a note in the Master's Office. See *Slabber* v. *Neser* (5 Sheil, 189); *Mills* v. *Benjamin* (Buch. 1876, p. 115); *Tradesmen's Benefit Society* v. *Du Preez* (5 J., 269). In the absence of registration and absence of any vesting title the plaintiff is at most only entitled to £500 out of the estate.

The Chief Justice said: It is impossible for the Court, after hearing the evidence, not to disapprove of the defendant's conduct, but such disapproval would not justify the Court in giving judgment against him upon a point which he was not prepared to meet. There is evidence that Mrs. Nel intended to give to her grandaughter, the plaintiff, the same amount as the other heirs had received from the estate of the late J. J. Nel, sen. viz., £1,566. That amount she authorised the defendant to pay into the Guardians' Fund for the benefit of the plaintiff, but only in case the plaintiff should survive her. The Master refused to accept the money and therefore the defendant, acting, it would appear, under instructions from Mrs. Nel deposited the sum of £1,400 with the African Banking Corporation as a fixed deposit to the credit of the late J. J. Nel's estate at 4 per cent. interest. The declaration alleges that the defendant had undertaken to place the amount of the donation in the bank in the plaintiff's name, but there is no evidence whatever in support of this allegation. If it had been proved that the money was delivered to and accepted by the defendant for the purpose of depositing it in the plaintiff's name, and that the defendant appropriated it to his own use or otherwise misapplied it, the plaintiff would certainly have been entitled to the relief prayed for. The defendant would have been bound by any stipulation made with him by Mrs. Nel on behalf of the plaintiff as soon as it was accepted or otherwise ratified on behalf of the plaintiff, who is a minor, by her father. But no such stipulation on Mrs. Nel's part or promise on the defendant's part has been proved in the present case. The only undertaking that could possibly have been inferred from the evidence was that he would do what was legally necessary to complete the gift of £ .56, but if this had been the undertaking relied upon, the action should have been for damages for breach of this undertaking. In view of the unsatisfactory state of the evidence regarding the defendant's promises to Mrs. Nel there must be absolution from the instance in respect of the claim made against him individually. The executors of Mrs. Nel's estate, of whom the defendant is one, have been allowed to intervene as defendants, and the question next arises whether the plaintiff is entitled to recover the sum of £1,566 or any part thereof from the estate. The evidence is conclusive that it was Mrs. Nel's intention, repeatedly expressed to the plaintiff's father and to others, to make a gift of £1,566 to the plaintiff in case she survived Mrs. Nel, and that the promise of the gift was accepted by the plaintiff's father on her behalf. There is no question in this case of a testamentary writing as there was in *Van Wyk* v. *Van Wyk's Executors* (5 J., 7), nor of *donatio mortis causa*. The donor's intention was that the gift should be irrevocable and should certainly take effect, provided only the donee survived her. She attempted to carry out this intention by instructing the defendant to pay the money into the Guardians' Fund for the benefit of the plaintiff. When the Master refused to accept the money she appears to have instructed the defendant to deposit £1,400 with the bank but in the name of her deceased husband's estate. This deposit was transferred after her death into the name of her estate. If the money had been accepted by the Master for the benefit of the plaintiff, or if the deposit in the bank had been made in the plaintiff's name, the important question would have arisen whether the transfer of the *dominium* to the plaintiff dispensed with the necessity of registration of the donation. But there was no such transfer of *dominium* and the money reverted to the donor's estate. To what extent then can the donor's promise be enforced as against her executors? There was no consideration for the promise but, as has been frequently held in this Court, donations when clearly proved form an exception to the general rule that the Court will not enforce a contract not founded on consideration. There had not only been a promise but a setting apart of a greater portion of the amount promised. There had also been an acceptance of the gift on behalf of the donee. The proof of the donation

is complete, but one thing is lacking for its full validity, and that is registration. The absence of registration, however, only renders the excess over £500 invalid. To the extent of £500 the donation can still be enforced, and for that amount judgment must be given, with costs out of the estate.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Sauer & Standen.]

VICTORIA WOOLLEN FACTORY, LIMITED, IN LIQUIDATION V. DAVID DRAPER.

Mr. Graham applied for leave to arrest the defendant and to attach his person to found jurisdiction in an action instituted to obtain payment of certain promissory notes, amounting to £4,094.

The Court granted an order for the attachment of certain shares, and gave leave to sue by edictal citation; returnable February 1; personal service.

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ZEEDERBERG AND DUNCAN V. BLOEM AND BRILL. 1896. Dec. 2nd.

The hearing of this case was resumed.

Mr. Tredgold, who appeared for the plaintiff, said that this was an action for £38 6s. 8d., partly heard on the last day of term, and postponed for two days in order to enable the defendants to have legal advice.

The Court gave judgment for the plaintiffs with costs.

ARDERNE AND CO. V. MOSS.

Mr. Graham applied for the rule *nisi* already granted, calling upon the defendant to show cause on December 2 why certain moneys lodged by him in the Standard Bank should not be attached, in order to meet the plaintiff's account and costs, to be made absolute.

The Court granted the application.

SCHWEIZER, N.O. V. SUN FIRE INSURANCE COMPANY. 1896. Dec. 2nd, 4th, 7th.

Insurance—Condition—Particular account—Waiver—Time limit.

In an action on a policy of fire insurance on merchandise, containing the condition that the insurer shall deliver a particular account within fifteen days after the loss or damages, or such further time as the company might allow, it appeared from the correspondence that eight days after the fire the plaintiff asked for seven days in addition to the fifteen, that the company refused to grant the extension, that after the expiration of the fifteen days the company informed the plaintiff that no steps for payment would be taken unless he supplied a proper account, that after a long delay the plaintiff practically refused to render such account and gave notice of his action, and that thereupon the company, acting on such refusal, notified to the plaintiff that it declined to pay even if the account should still be rendered.

Held, that *the company was not bound to accept an account tendered after such notification and that waiver of the time limit of fifteen days did not amount to an indefinite extension of the time for delivering the account.*

The case of *Hollander* v. *Royal Insurance Company* (4 Juta, 66) distinguished.

This case was one brought by Mr. C. A. Schweizer, of Burghersdorp, as liquidator of the firm of Kruger, Pelser & Co. (in liquidation) for the recovery of a sum of £1,932 19s. 3d., being the amount of loss alleged to have been sustained through a fire which took place at Burghersdorp on May 25, 1896, damaging a certain building and consuming merchandise. The parties to the case had consented by correspondence to ask the decision of the Court upon the question of whether the defendant company had or had not waived a right to have submitted to them within fifteen days a detailed account of the items of loss.

The plaintiff's declaration alleged:

1. One Johannes Jacobus Styger, heretofore residing in and carrying on business as a general dealer at Burghersdorp, did on the 10th day of

January, 1896, lawfully effect with the defendant company a policy of insurance against fire to the extent of £4,250, being:

(*a*) £1,000 on a building, occupied by the said Styger as a store and dwelling-house, situate detached in erven 30 and 3', Van der Walt-street, Burghersdorp, brick-built, with iron roof.

(*b*) £2,500 on general merchandise in the said building.

(*c*) £250 on business fixtures, fittings, office furniture and utensils.

(*d*) £500 on household goods, fixtures, musical instruments, &c., as will more fully appear from the said policy issued by the defendant company, No. 5,551,211, in respect of which insurance the premium was duly paid.

2. The said policy was duly ceded on the 26th day of March, 1896, to the said firm, together with interest thereon.

3. The plaintiff is the duly appointed agent, representative, and liquidator of the said firm, whose affairs are in liquidation for the benefit of its creditors, and in his said capacity is the proper person to have and maintain this action.

4. The said policy was in full force and effect on the 25th day of May, 1896, on which day a fire damaged or destroyed the said building, general merchandise and household goods, furniture, fixtures, musical instruments, &c., above referred to, and so insured as aforesaid, causing loss or damage to the following extent, to wit:

(1) Under head (*a*) in paragraph 1	£84	8	9
(2) Under head (*b*) in paragraph 1	1,690	7	6
(3) Under head (*c*) in paragraph 1	44	12	0
(4) Under head (*d*) in paragraph 1	113	11	0
or in all, loss or damage to the extent of	1,932	19	3

5. Due notice of the occurrence of the said fire was given to the defendant company or its agent, and a claim in writing made for the loss or damages, but the said company waived the necessity of compliance within 15 days, with so much of the 9th condition of the said policy as required that "as particular an account as may be reasonably practicable of the several articles or items of property damaged or destroyed, stating the amount of the damage to each, and the value of each at the time of the loss or damage, not including any profit," should within 15 days after the said 25th of May be delivered to the company in connection with the claim in writing for the loss or damage sustained; and as to the loss or damage under head (*b*) aforesaid, the said account was thereafter and before action brought, though not within the said period of 15 days rendered to the defendant company, which refused to accept the same, but admitted that a sufficient account under heads (*a*), (*c*), and (*d*) had been theretofore rendered within the said period.

6. Subject to paragraph 5, the plaintiff has complied with all conditions of the said policy and it is not now competent to the defendant company to refuse to recognise the claim for loss or damage under head (*b*) merely by reason that the said account was not rendered within the period of 15 days aforesaid, yet for that reason the defendant company has so refused to recognise the said claim.

7. Moreover, notwithstanding lawful demand, the defendant company has wrongfully and unlawfully neglected and refused to pay the entire claim of £1,932 19s. 3d. as aforesaid and has paid in part thereof.

Wherefore the plaintiff prays for judgment for the sum of £1,932 19s. 3d., or that he may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

The defendant's plea set forth:

For a plea to the declaration the defendant company says as follows:

1. It admits the allegations in the first three paragraphs, but it says that the said policy was issued subject to certain conditions, and it annexes hereto a copy of the 9th of the said conditions marked A, and which it prays may be taken to form part of this plea.

2. It admits all the allegations in paragraph 4, save and except the allegation that the damage done to the merchandise insured as aforesaid amounted to the sum of £1,690 7s. 6d.; it admits that considerable damage was done to the said merchandise, but it refers this Honourable Court to such proof of the amount thereof as the plaintiff may adduce.

3. As to the 5th paragraph, it admits that the plaintiff gave due notice of the occurrence of the said fire, and the plaintiff also made a written claim for the loss or damage alleged to have been sustained, but it denies that it waived the necessity of compliance by the plaintiff with any portion of the 9th condition of the said policy save that portion which provides for a reference to arbitration. Particular accounts of the damage sustained under heads (*a*), (*c*), and (*d*) in the declaration referred to were timeously rendered; the defendant has admitted that the said accounts are sufficient, and has tendered to satisfy them as hereinafter set forth. As to the damage under head (*b*), no account showing any particulars of the said damage was tendered at all by the plaintiff until the 3rd October, 1896,

when certain statements were tendered which the defendant company refused to accept, as it had a right to do.

4. It denies that the said statements of account were such statements as were reasonably practicable of the articles or items damaged or destroyed as required by the terms of the said 9th condition of the said policy.

5. It contends that it is competent for the defendant company by reason of the matters set forth in the 3rd and 4th paragraphs hereof to refuse to recognise the plaintiff's claim for damage under head (*b*) aforesaid; subject to the above it denies the allegations in the 6th paragraph of the declaration.

6. As to the 7th paragraph, it says that on the 4th November, 1896, it tendered to pay to the plaintiff the sum of £242 11s. 9d., being the damage claimed under heads (*a*), (*c*), and (*d*), together with taxed costs to that date, which offer the plaintiff has accepted; but it has lawfully refused and still refuses to satisfy any further portion of the plaintiff's demand.

Wherefore it prays that the plaintiff's claim may be dismissed with costs.

The plaintiff's replication admitted the correctness of the copy of the 8th condition of the policy annexed to the plea, and admitted their acceptance of the defendant's offer as to claims under heads (*a*), (*c*), and (*d*), together with taxed costs to the 4th November, 1896, as set forth in paragraph 6 of the plea.

Otherwise it was general.

Annexure A was as follows:

9. On the happening of any loss or damage by fire to any of the property hereby insured, the insured shall forthwith give notice in writing thereof to the company, together with information as to the known or presumed cause of the fire, and within fifteen days after the loss or damage, or such further time as the company may allow in that behalf, and at his own expense deliver to the company a claim in writing for such loss or damage, containing as particular an account as may be reasonably practicable of the several articles or items of property damaged or destroyed, stating the amount of the damage to each, and the value of each at the time of the loss or damage, not including any profit, and shall also, if required, deliver an account with particulars and values of all other property (if any) hereby insured, and shall produce and give all such books of account, vouchers, invoices (whether originals or copies) plans, specifications, proofs, and explanations as may be reasonably required, together with the particulars of any other insurance or insurances effected by him, or on his behalf, on the property insured by or in any way referred to in this policy, and if required a declaration on oath or affirmation of the truth of such accounts; and no claim whatever under this policy shall be payable, unless the terms of this condition have been complied with, and unless the insured shall within three months after receiving notice from the company that the claim is not admitted, refer to arbitration the liability and the amount or extent of the liability of the company in respect thereof.

Upon these pleadings issue was joined.

Mr. Schreiner, Q.C. (with whom was Mr. Benjamin) appeared for the plaintiffs.

Mr. Innes, Q.C. (with whom was Mr. Cloete), appeared for the defendant company.

Mr. Schreiner said that if the question of waiver was determined in favour of one or other of the parties they would then ask for a postponement of the case.

The Chief Justice pointed out that the Court did not as a rule hear a case by instalments. It must be understood that the present was a special case, and must not be construed as a precedent.

The principal letters in the correspondence were as follows:

The following were the principal letters in the correspondence between the parties, on which the action was heard:

(1) To J. J. Scheepers, Agent Sun Insurance Office, from J. Victor Kannemeyer, p.p. C. A. Schweizer, 2nd June, 1896.

With reference to the loss sustained by fire to the premises and goods insured under above policy, I am instructed to request you that seven days be granted in addition to the fifteen days allowed under section 9 of the general conditions of the policy for framing the claim for loss sustained.

(2) From Scheepers to Schweizer, 4th June, 1896.

In reply to yours of the 2nd instant I am instructed to write and inform you that the company cannot grant you an extension of time, and that they will keep themselves to the conditions of the policy.

(3) From Schweizer to Scheepers, 8th June, 1896.

I am in receipt of your favour of 4th inst. and am instructed to submit claim for £1,963 5s. 4d. for damage caused by fire to the property insured under above policy on the 25th ult. For your information I enclose detailed statement of loss:

Merchandise.—The whole of the merchandise having been rendered unsaleable claim is made for the whole stock on the premises as shown

by the books of Mr. J. J. Styger, which together with all vouchers can at any time be inspected at my office.

Building Fixtures and Fittings, Furniture. The damage to these has been assessed by a competent man and full particulars will be found on reference to the detailed statement.

Everything in the shop and house has been left in the same state as it was found when the keys of the property were handed over to me, and I shall be pleased to hear when Mr Styger can resume possession of the dwelling-house.

The statement enclosed gave full details of the items of loss under the various claims except the principal one, viz.: merchandise. This appeared on the statement simply in the following form:

Merchandise: as per books of J. J. Styger. £1,721 13s. 7d.

(4) From Scheepers to Schweizer, 11th June, 1896.

With reference to your letter and claim in this matter I am instructed to write and ask you to comply with section 9 of the general conditions of the policy, inasmuch as the goods alleged to have been destroyed are capable of being specified, and further a declaration on oath of the value of such goods as are damaged and such other goods as are insured under the said policy but not damaged.

(5) From Scheepers to Schweizer, 16th June, 1896.

I am instructed by the manager of the Sun Insurance Company to send you this form (which I enclose) to be filled in. Kindly have this filled in and affirmed on oath.

(6) From Scheepers to Schweizer, 19th June, 1896.

I am instructed by the manager of the Sun Insurance Office, to write and ask you to comply with condition No. 9 of the Fire Insurance Company policy, and to supply me with "specified account of the loss sustained by your client."

I beg further to inform you that the company will insist on having such a specified account before they can take any steps in this matter. The only reply to this was a letter enclosing one of the Sun Fire Office's forms (forwarded under cover of letter No. 5). The form was nominally filled in, but under the item of merchandise the total value alone was given without any details, and with a simple reference to Mr. Styger's books exactly similar to that in the statement enclosed in letter (3).

(7) From Schweizer to Scheepers, 22nd June, 1896.

I am in receipt of your favour of the 19th inst., asking for a specified account of the loss sustained by my client.

In the statement submitted to you a detailed account was given of everything with the exception of the merchandise, and if your company requires the items hereof to be specified, they are demanding an impossibility. Kindly advise me whether it is to the merchandise that your letter under reply refers, and if not, what further particulars you require. Much valuable time is being lost to my client by the action of your company, in not stating explicitly what further information is required, and I shall be pleased if you will write me fully at your earliest convenience.

(8) From Scheepers to Schweizer, 11th July, 1896.

In reply to yours of the 22nd instant, I beg to state that I have been instructed by the manager of the Sun Insurance Company to inform you that no steps will be taken by them unless you supply them with a specified list of the stock, damaged and otherwise. This is one of the conditions of the policy.

(9) From Van Zyl & Buissinné to Manager, Sun Insurance Office, 6th August, 1896.

This was a letter claiming payment of the amount alleged to be due, alleging "that detailed particulars of the loss sustained and damage done to our clients by reason of the destruction of the merchandise &c., were duly forwarded" . . . and concluded thus: "Unless we hear from you on or before Saturday the 15th instant, or have received your cheque in settlement, our client will take legal proceedings to enforce his rights."

(10) From Messrs. Fairbridge, Arderne & Lawton to Messrs. Van Zyl & Buissinné, 2nd September, 1896.

Your letters of the 6th and 10th ultimo, addressed to the agent of the Sun Insurance Office, were received by him. He found it necessary to make inquiries and to get certain information before replying, and having received these he has instructed us to address you on the subject.

The 9th condition of the policy provides what the insured shall do in the event of any loss or damage by fire. During the correspondence which has passed between Mr. Schweizer, acting for the claimants, and the local agent of the company, the company has insisted that the claimants have not complied with the 9th condition.

It went out of its way to point out to your clients what was necessary to be done, although it might have confined itself to the strict legal position which it was entitled to take up.

The insured, however, did not avail himself of the opportunities given him and failed to comply with the terms of the condition. We, therefore, give you notice that, inasmuch as the terms of the 9th condition of the policy have not been complied with the company cannot entertain the claim.

In view of the fact that the failure of the assured to comply with the 9th condition disentitled him to make any claim it is necessary to consider what other objections to the demand might be raised by the company. We wish it to be clearly understood that the company waives none of its rights in this matter.

In contemplation of the statement that your clients will persist with their claim, we have to state that the company accepts the waiver of the 16th consideration offered by you, and agrees that the matter shall be settled in a court of law.

(11) From Van Zyl and Buissinné to Fairbridge, Arderne & Lawton, 18th September, 1896.

We have received a communication from Mr. C. A. Schweizer, of Burghersdorp, relative to the above matter in which he states that the correspondence between his office and your clients passed at a time when he personally was confined to his room by illness and unable to attend to business.

Now that he comes to look personally into the facts he discovers that his manager was under the impression that the company required a specified account of all the items destroyed and not merely an approximate one.

A supplementary account is being prepared and will be rendered to you in due course.

Meanwhile we write to inquire informally and without prejudice if the Insurance Company are willing to accept this statement when rendered *nunc pro tunc* and to settle the claim.

Kindly let us have a reply as soon as you have been able to communicate with your clients.

(12) From Fairbridge, Arderne & Lawton to Van Zyl & Buissinné, 26th September, 1896.

In this matter we wrote on the 2nd inst., to inform you that the Sun Insurance Office maintains that there was no claim against them upon the policy taken out by Mr. Styger, on the ground that no account had been at any time sent in setting forth the particulars of loss required by the 9th condition of the policy. On further consideration the company has decided to admit that the insurances on the merchandise and on the buildings, fixtures and fittings, and furniture are separate and distinct.

The insured did send in a claim for the loss sustained by him, which so far as it relates to the building, fixtures, fittings and furniture, the company is prepared to accept as a compliance with the 9th condition, subject to the production of such further particulars as the company is entitled to ask for. It is however to be understood that in admitting these claims it is not to be taken that the company in any way waives any of its rights in respect of the claim for the merchandise.

In order to revise the amounts that the company is willing to pay with regard to the building, fixtures, fittings and furniture, &c., we have to request that the insured will produce a builder's certificate as to the loss sustained on the building, and a carpenter's certificate as to the loss on the fixtures and fittings. A certificate or some other proof from some qualified person should also be produced with regard to the furniture, &c. It would perhaps simplify the matter if it were referred to Mr. Schweizer and Mr. Scheepers, the local agent of the company. They might appoint some person or persons who would adjust the loss on these heads.

Let us hear what you propose in this respect. Should the insured desire to proceed with his claim in respect of the insurance on the merchandise, the company will defend the action.

(13) From Van Zyl & Buissinné to Fairbridge, Arderne & Lawton, 3rd October, 1896.

Your letter of the 28th ulto. came duly to hand, and has been referred to our client for attention.

As you were verbally informed some weeks ago, as soon as Mr. Schweizer had recovered sufficiently from his illness to attend to business the stock list and papers belonging to Mr. Styger were gone over, and the books looked into and the damage ascertained as far as practicable.

The results of these investigations are contained in the accompanying statements, which we trust your clients will find supplement as fully as Mr. Styger is in a position to do the information already supplied.

After correcting some errors that have been discovered in the original claim, the figure for which a settlement is required amounts to £1,932 19s. 3d.

(14) From Fairbridge, Arderne & Lawton to Van Zyl & Buissinné, 7th October, 1896.

Your letter of the 3rd inst., enclosing statement of loss sustained by the insured, reached us yesterday. The fire took place on the 25th of May last, and the company cannot therefore accept the statement as in compliance with the 9th condition of the policy. We accordingly return it herewith.

On the 18th ulto., Mr. Kayser, of your office, informed us that a statement of loss would be submitted. He informed us that what took place between us was without prejudice and we therefore prefer to say nothing on this point.

(15) From Van Zyl & Buissinné to Fairbridge, Arderne & Lawton, 18th November, 1896.

The main issue in this case must after all turn upon the construction which the Court places upon the correspondence that has passed between the parties to the suit or their agents, and before going into the further question as to the amount of the loss sustained it would be as well if we could have the ground cleared by a decision of the Court upon this main issue, for if the finding should be in favour of the defendant, the action would probably terminate, and if for the plaintiff, then a reference to some appraiser or other impartial person would probably be the most efficacious way of settling the further differences between the parties.

With a view to adopting some such course we therefore write to inquire whether the defendant company will assent to the following admission:

That the accounts rendered which the defendant company refused to accept would have constituted a sufficient compliance with the 9th condition if rendered within fifteen days after the occurrence of the fire.

Such an admission would not bind the defendant company to the correctness of the amount claimed by the plaintiffs' but would narrow the issue to the question of waiver in the first instance.

Should the defendant company not see its way clear to admit that the accounts rendered would have been sufficient if rendered within fifteen days we trust it may still be possible to arrange a basis upon which the main issue as to waiver and the issue as to the sufficiency of the accounts may be determined by the Court at a hearing during this term, leaving the details regarding the actual amount of the loss to be settled thereafter, either by arbitration or by further hearing, say in February, should a settlement not be arrived at in the meanwhile.

(16) From Fairbridge, Arderne & Lawton to Van Zyl & Buissinné, 19th November, 1896.

The defendants are willing to do anything that will assist to diminish the expenses of the action. We are prepared therefore on behalf of the defendants to agree that if the Court holds that the defendants were bound on the 3rd October, 1896, to have accepted an account drawn up and framed in accordance with the requirements of the policy the defendants shall now accept the account tendered on that day by the plaintiffs and take to it no other exceptions or objections than they might properly have raised if the account had been rendered within fifteen days of the fire.

(17) From Van Zyl & Buissinné to Fairbridge, Arderne & Lawton, 21st November, 1896.

We have to acknowledge the receipt of your letter of the 19th instant, and seeing that you are not prepared to make the full admission put forward by us, we have decided in order to avoid expense and save time to agree to the form in which you have worded the arrangement to determine the main issue, leaving the sufficiency of the statements and the accuracy of the details rendered by plaintiff for future discussion and debate if need be. Upon the understanding that the correspondence between Mr. Schweizer per Mr. Kannemeyer and Mr. Scheepers as representing the company, and between yourselves and ourselves (excepting the letters written without prejudice) shall form part of the record without being regularly proved, we have set the case down for hearing on Friday the 27th instant, in order to obtain a decision on the question of waiver only, and shall consequently subpœna no witnesses. It is also agreed that no objection will be raised by either party to an application for a postponement of the case to the February term for evidence and judgment on any of the other issues raised.

Mr. Schreiner, Q.C., for the plaintiffs. The whole point of this case is the construction of clause 9 of the general conditions of the policy. This case must be distinguished from *Hollander* v. *Royal Insurance Company* (4 Juta, 66. We base our case on waiver by the defendants of their strict claim under the clause in question. At the least the letter from defendants' attorneys of the 2nd September proves the waiver, but the condition under which defendants claim is a highly penal one and the Court will not decree forfeiture on such an abrupt letter as that—for they having waived the "fifteen days" right the condition does not entitle them to give a moment's notice. Such a condition is always construed strongly against the insurer. The defendant's letter of the 11th July completely opens the door as to time, and the waiver as to time is clear from their conduct in demanding, by letter, the required details. The condition must under the circumstances be read as if incorporated therein were the letters between the parties Look at the expressions used "before taking any steps in the matter," "no steps will be taken unless you supply the

required details." We must admit that the furnishing of the details is a condition precedent to recovery under the policy—also that Mr. Kannemeyer, who wrote on behalf of Mr. Schweizer, made a mistake in not supplying full details instead of doing as he did—simply referring to the books. But owing to the waiver of time our right to recover has not been extinguished, but merely postponed till the proper accounts are furnished. The company has sustained no prejudice, they could so easily have seen the books referred to, though it is true it was not their duty to look them up. On September 2, they were bound to ask for, and were at most entitled to our rendering the accounts in a reasonable time, though it is true a "reasonable time" after the 2nd September would be a shorter one than we would have been entitled to earlier. As to the form of pleading, a nude fact of course does not support an action, but it affords ground for exception, and we merely anticipate in our declaration the exception the defendant's would have taken. *Bunyan Fire Insurance* (pp. 102, 103); *Malan* v. *Secretan, Boon & Co.* (Foord, 94): *Roper* v. *Lendon* (1 E. and E, 825); *Hadel and Another* v. *Brown* (L.R. Appeal Cases, P.C., 1896, p. 372).

Mr. Innes, Q.C., for the defendant argued: The first point to note is the form of declaration, which is based on a waiver. This is most unusual. But the real issue is, has there been a waiver? We must admit there has been as far as regards the fifteen days: but we claim under the alternative and somewhat unusual clause in condition 9, "or such other time as the company shall allow." There has been no *pactum de non petendo* in this case. Every letter safeguards the right of the company. If there has been any waiver it might be by conduct, *i.e.* estoppel, as the English law calls it. But we deny that there has been, and we assert that the company is not bound to show any prejudice—but that after fifteen days it has *absolute* discretion as to what time to allow—whatever time is fixed is inexorable each successive demand is a mere extension of time at our discretion as an act of grace on our part. The defendants were asked for a specified extension of time and refused: each subsequent demand by defendants for the account to be rendered (no time being specified) was equivalent to a demand for the accounts to be rendered forthwith.

Postea.

The Chief Justice said: This is an action on a policy of fire insurance on merchandise, and the question to be determined is whether the defendant company has waived the benefit of the condition fixing a time limit within which a particular account of the loss or damage was to be delivered to the company. The ninth clause of the conditions requires that the insured shall "within fifteen days after the loss or damage, or such further time as the company may allow in that behalf, and at his own expense, deliver to the company a claim in writing for such loss or damage, containing as particular an account as may be reasonably practicable of the several articles or items of property damaged or destroyed, stating the amount of the damage to each, and the value of each at the time of the loss or damage, not including any profit." The fire took place on the 25th May, 1896, and on the 2nd of June the plaintiff requested the defendant company's agent to give him seven days in addition to the fifteen allowed under the ninth clause for framing the claim for loss sustained. The answer given on the 4th of June was: "The company cannot grant you any extension of time and they will keep themselves to the conditions of the policy." A further correspondence ensued, which was carried on after as well as before the expiration of the fifteen days, and in the meantime no detailed account, so far as was reasonably practicable, of the damage done to the merchandise was furnished to the company. As late as the 11th of July the plaintiff was informed that no steps would be taken by the company unless he supplied a specified list of the stock damaged and otherwise. No such list was supplied, but on the 6th of August the plaintiff's attorneys wrote to the company that unless his claim was settled on or before the 15th he would take legal proceedings to enforce his rights. On the 2nd of September the company's attorneys wrote in answer that inasmuch as the terms of the ninth condition had not been complied with, the company could not entertain the claim. On the 18th of September the plaintiff for the first time expressed his willingness to prepare an approximate account of the loss, and stated that a supplementary account was being prepared, which would be tendered in due course. On the 28th September the company's attorney stated that the account could not be accepted, and on the 3rd of October an account was tendered to the company which, for the purpose of the present case, may be taken to be such an account as would have been sufficiently complete if tendered within the time fixed by the policy. On behalf of the defendant company it has been candidly admitted that it can no longer claim the benefit of the fifteen days' limit fixed by the policy. After the expiration of the fifteen days the company repeatedly requested compliance with the condition requiring

such a detailed account as was reasonably practicable, and if, in answer to this request, there had been no refusal, but a compliance within a reasonable time, the company would have been bound to accept the account tendered. But the conduct of the plaintiff before the 18th September amounted, in my opinion, to an absolute refusal to give such a full and detailed account as would enable the company to test the reality and extent of the damage to his merchandise. Nearly four months had elapsed since the fire, and more than two months since receipt of the letter from the company of the 11th July requiring a specified list of the stock damaged. If, in answer to that letter, the plaintiff had said, in so many words, "I have rendered a sufficient account and refuse to supply another," there can be no doubt that the company would have been released from any offer it may impliedly have made to accept a proper account, notwithstanding the expiration of the fifteen days limit. The plaintiff did not use these exact words, but the conduct of himself and his legal advisers was equivalent to the use of these words. On the 6th of August his attorneys wrote to the company fixing a day for the settlement of the whole claim and stating that, failing such settlement, an action would be brought. The letter contained no offer or tender even at that stage to supply a proper account, and, in fact, no such account was offered until after the company had in effect given notice, by their attorneys' letter of the 2nd September, that such an account would no longer be accepted. That notice the company was, in my opinion, entitled to give, after the plaintiff's persistent refusal to avail himself of the opportunities afforded to him by the company. On behalf of the plaintiff, the Court has been referred to the case of *Hollander* v. *Royal Insurance Company* (4 Juta, 66), but the facts of that case were very different. The real question to be determined was whether the account which had been rendered to the company was sufficiently detailed, and the company did not seriously deny that it had waived the right of insisting upon the time limit fixed by the policy. Throughout the negotiations that company expressed its willingness to accept an account provided only it were such as the conditions required, and even after the issue of summons the company still asked for the information which the plaintiff had failed to give. The fact also that the company claimed the right to repudiate the contract altogether on the ground of the breach of another condition in the policy had an important bearing on the question whether the company had waived the benefit of the condition as to a time limit. In the present case the only dispute between the parties had reference to the ninth condition of the policy. The company in express terms refused to extend the time limit. It is true that after the expiration of the fifteen days the company was willing to give the plaintiff an opportunity of rendering a proper account, but when after a long delay the plaintiff refused to render such an account, and gave notice of his action, the company, acting, as it was justified in doing, on such refusal, notified to the plaintiff that it would not pay for the damage to the merchandise even although he should now render a proper account. The company was not bound to accept an account tendered after such notification, inasmuch as waiver of the time limit of fifteen days did not amount to an indefinite extension of the time for delivering the account. The result is that there must be absolution from the instance with costs after date of tender.

Mr. Justice Buchanan, in concurring, said: This is purely a legal question. The contract between the plaintiffs and the company contains a clause which requires that, in the case of a fire, an account should be sent in to the company within a certain time. It was alleged that the defendant company waived the condition in their favour. I have read the correspondence, and am unable anywhere to place my hands on any act of theirs which amounts to a waiver, nor can I see an implied waiver.

Mr. Justice Maasdorp concurred. He said: My finding as to the question of waiver would be almost in terms of the admission made by Mr. Innes that they had allowed the time to expire, and continued to ask for this account, and, therefore, could no longer fall back upon that fifteen days, but after the time had gone by the account should have been rendered within a reasonable time.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

STURK AND CO. v. DIETERLE. { 1896. Dec. 3rd.

The hearing was resumed of an application for a commission, and in connection with costs of an application for an interdict, made in this Court on September 12.

Mr. Searle, Q.C., for the applicants.

Mr. Innes, Q.C., for the respondents.

The commission was ordered, applicant to pay costs of application on September 12, and costs of present application to be costs in the cause. The British Consul at Hamburg was appointed commissioner, and failing him Dr. Jacques.

WIID v. MURISON. { 1896. Dec. 3rd.

Sale and purchase—Warranty—Material defect—*Actio redhibitoria.*

In order to entitle an inexpert purchaser, who has paid for and received the article sold, to recover the purchase-money by the actio redhibitoria *it is not necessary that there should have been an express warranty of its quality.*

Statements as to quality made by the seller to such purchaser before or at the time of the purchase are sufficient if a material defect which is not readily ascertainable be subsequently discovered.

This was an action for the recovery of £40, paid by Wiid to Murison for a second-hand wagonette, which was tendered back to Murison as not being according to warrant.

The plaintiff's declaration alleged:

1. The plaintiff and defendant reside in Cape Town.

2. Before the 16th day of October, 1896, the parties entered into negotiation for the purchase by the plaintiff of a certain wagonette, then the property of the defendant, and the defendant before and also on the said 16th day of October, 1896, specially represented and warranted the said wagonette to be in good working order.

3. Thereupon on the said 16th day of October, 1896 and upon the faith of the said special representation and warranty which was a condition of the transaction, the plaintiff agreed to purchase the said wagonette from the defendant for £40 sterling, which sum on that day he duly paid to the defendant.

4. Thereafter the plaintiff took delivery of the said wagonette, whereupon he discovered that owing to defects of which the defendant was aware, but which at the time of purchase the plaintiff could not discern, the said wagonette was not in good working order, but was in fact out of order and could not be used for the purpose for which it was bought by him and sold by the defendant, and the aforesaid special representation, warranty, and condition has been broken by the defendant, the said representation being false and untrue.

5. The plaintiff then and hereby tenders to return the said wagonette to the defendant, and is entitled to be paid the said sum of £40 sterling, together with interest from the said 16th day of October, 1896.

Wherefore the plaintiff prays for judgment for the sum of £40 sterling, with interest from the 16th day of October, 1896, he tendering to return the said wagonette to the defendant, or that he may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

For a plea to the declaration the defendant said as follows:

1. He admits the allegations in the 1st paragraph.

2. As to the 2nd paragraph, he admits that on or about the 14th day of October, 1896, the plaintiff came to inspect, and did inspect a certain wagonette then the property of the defendant, which the plaintiff was desirous of purchasing, but he denies that he then or at any subsequent date specially represented and warranted the said wagonette to be in good working order.

3. He admits that on the 16th October the plaintiff, after again examining the said wagonette, agreed to purchase it for the sum of £40 sterling, and paid the said purchase amount, but he denies the other allegations in the 3rd paragraph of the declaration.

4. He admits that the said wagonette was thereafter delivered to the plaintiff; he says specially that up to the date of delivery the said wagonette had been in the constant use of him the defendant, and that he was not aware of any defect in it, and he denies all the allegations in the 4th paragraph of the declaration save the allegations as to delivery.

5. He admits the plaintiff's tender to redeliver the wagonette, but he denies all the other allegations in the 5th paragraph.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Mr. Schreiner, Q.C. (with him Mr. Graham), for the plaintiff.

Mr. Innes, Q.C. (with him Mr. Buchanan), for the defendant.

George Archer Till, in the employ of White, Ryan & Co., said that in October last plaintiff made inquiries about a wagonette, and after trying to sell him an American one, he went and saw Murison, who said he had one to seat ten, for which he would take £40. Witness said it was a big price for a second-hand wagonette, and asked if it was in perfect order. Defendant replied that it was, or he would not sell it. He saw the wagonette, which was a good-looking one, well-painted and newly furbished up. He saw no defect in it. On October 16 Wiid saw him again and said he was going to buy it. On October 19 he saw Wiid, and went to see the wagonette. The fore carriage would not turn. It should turn almost completely round. Some time afterwards Murison came to see him, and said that Wiid had summoned him. Murison said that he knew it had been working regularly ever afterwards. Witness said he did not believe it. Murison said that it must have been damaged by being taken away behind a wagon.

Cross-examined: The wagonette he believed was bought to take picnic parties. Murison said that he was using the wagonette every day before it was sold.

Siebert Johannes Wiid said that after a conversation with Till he went to defendant's place and saw him. Defendant said the wagonette was in the store. He went and saw the wagonette behind two carriages. It looked well, and defendant said it was in good order; he had lately been using it himself. He had never bought a wagonette before. When they got outside the coach-house he asked defendant if it was in good order, and the reply was that he would not sell it and guarantee it if it was not. He asked the price, and the answer was not a penny less than £40. On October 16 he went again to complete the arrangements, and again asked if the thing was in good order, and defendant then asked how many times he wanted the thing guaranteeing. He told him to span it in, and drive it round the Kloof and make plenty of money. Defendant would not take £36 for the wagonette, and he then gave a cheque for £40. Next day (Saturday) he took the wagonette to his place tied behind a wagon. On Sunday he was about to take the wagonette out of the shed, when in turning it he heard a noise, and found that it was jammed, so that the front of the wagonette could not turn. He had since found that it was an old wagonette, and had been patched up considerably. It would work all right if the road on which it ran was fairly straight, but if it had to turn very much it jammed. The wagonette had never been worked since he got it. It would cost £15 to repair the wagonette, but now he did not want it. Defendant had substituted an inferior pair of lamps on it to those he had seen when he bought it.

Cross-examined: When he had been to look at the wagonette he only went to see if it was of suitable size. When defendant had guaranteed that it was in good working order he took no further trouble to examine it. He was sure that the lamps had been altered. It was clear that a crack in the felloes had been made since the wagonette had been painted.

Archibald Gray, coachbuilder, said that late in October he went to see the wagonette. The under carriage was not in good working order. The futchels were broken. There was only one felloe-piece there instead of two. The felloe-pieces should lie on the futchels, but in this case they rested on two blocks, which rested on the futchels. They had been necessitated by the breaking of the futchels. The wagonette had been constructed to turn at right angles, but now it would not do so and then turn back again. It was dangerous to use such a carriage. It would cost from £12 to £15 to repair it. The wagonette was about thirty-five years old he thought.

Cross-examined: If there was a three-quarter lock stop on the wagonette it would work, but it could not be put on as the wagonette was constructed at present. No matter how large a felloe he put on it would not remedy the evil. It might go round the Kloof safely, but an accident might at any time happen.

By the Court: If the wagonette was properly repaired it would be worth about £47. As it now stood £32 was about the worth of the wagonette.

Frederiek Hampstead, carriage-smith for Messrs. Cooper, corroborated the evidence of the last witness.

For the defence,

Gordon Murison, livery-stable keeper, New-street, said he had bought the wagonette at General Cunyghame's sale about fifteen years ago for £50. It had been in constant use from the time he bought it. Within a few days of Wiid purchasing it it had been to Hout's Bay and round the Kloof. On September 16 an accident happened to it at Hout's Bay. It was there repaired, and driven home. It had worked all right since that time. Till saw him, and

asked him if he had a wagonette for sale, and he said that he had. He showed the wagonette to Till, and told him it was in good order. Wiid came a little afterwards, and examined the wagonette, shaking the wheels, and otherwise examining it. He would not take less than £40 for it, though plaintiff tried to barter him down. When plaintiff took the wagonette away on Saturday he again examined it. The lamps delivered with the wagonette were the same as had always been upon it. The wagonette had never had more than one felloe. He had paid 15s. for the repairs at Hout's Bay.

Cross-examined: He had never told Till that he knew that plaintiff had been using the wagonette. The wagonette had been turned at right angles several times just before. He had declined to guarantee the wagonette, saying that he guaranteed nothing.

Peter Ecksteen, coachman in defendant's employ, said that the wagonette was damaged at Hout's Bay. The driver was driving down to the beach, when he received sudden instructions to turn up to the hotel. The jerk of the sudden turn caused the damage. A wagonmaker soon put it right. He could not say that the lamps were the same. So long as he had known the wagonette it was like that—one could not turn too sharp with it because the top part slipped down and jammed. He did not tell his master that.

Franklin Raymond said he had repaired the hind carriage about six months ago. He had put a felloe-piece on larger than the present one, which would enable the carriage to turn much further than the one which had been put on at Hout's Bay.

Cross-examined: He did not think the futchel was broken. There was a crack there The wagonette should not be turned at right angles. If it did the carriage would slip and jam.

By the Court: With a careful driver the wagonette was in good working order; it was not so for a careless driver.

Cornelius Mostert, late livery-stable keeper, said that last week he saw the wagonette. He considered that the whole trouble was owing to the felloe being too short. If the felloe was three or four inches longer on each side there would be little danger of the crescent plate slipping down and jamming.

Mr. Schreiner, Q.C., for the plaintiff: We claim that a special guarantee was given by the defendant during the negotiations. But even if there was no such guarantee—there is a fatal and material defect in the article purchased which gives us a right to the *actio redhibitoria*. For if there is a material defect in any article sold, knowledge on the part of the seller is not required (the *actio redhibitoria* not being based on fraud) except (as *Voet* says) where an *artifex* or expert purchaser buys a thing of which he might be presumed to have special knowledge and where he could have examined it. The evidence shows that the defendant did or should have known of the defect, but this is not the point. The wagonette was sold with a defect material with regard to the object for which it was required and for which a material expenditure (at least £8, probably £12 to £15) will be required to remedy it. The *actio redhibitoria* must be brought in six months. (The *actio quantim minoris* can be brought within a year and a day.) In this case it is promptly instituted in a few days after discovery of the defect. The authorities on the *actio redhibitoria* were fully discussed in *O'Brien* v. *Palmer* (2 E.D., 344; see page 352 of the report as to the *knowledge* of seller and buyer); see also *Voet* (21, 1, 10): *De Wet* v. *Manuel* (1 Menz., 5, 10) shows that the ignorance of the seller is irrelevant. *Grotius* Introduction, Bk. III., chapter 15, section 7) shows that there must be such a defect as would prevent the purchaser buying: and this is the true test: the maxim holding here *De minimus non curat lex*. *Grotius* is confirmed by *Van Leeuwen* (Roman-Dutch Law, Vol. II., page 145 of Kotzé's Translation): and by *Van der Keessel* (Thes. 642); see also *Voet* (21, 1, 2) as to *morbus* or *vitium*. *Theron* v. *Africa* (10 Juta, 246) deals with the case of express warranty. Defendant in the present case said the wagon "was in good working order," which is such a warranty.

Mr. Innes, Q.C., for the defendant: The *actio redhibitoria* can only be brought on one of two grounds:

1. Where a man *conceals* some *morbus* or *vitium*.

2. Where he has given an *express* warranty. The civil law implies a warranty in certain cases. Now in Roman-Dutch law knowledge of the vendor is, in case of express warranty, immaterial. But knowledge of vendor when there is no warranty is *essential*, for *reticentia* or concealment implies knowledge: *Voet* (21, 1, 2); and there must be either *reticentia* or express warranty. *Voet* (19, 1, 15) says that the vendor is not liable for statements made by way of commendations merely. Did Mr. Murison intend to *guarantee* a first-class carriage of first-class excellence in this case? The defect in the wagonette is not a latent defect, but a patent one which any one wishing to examine it could see, especially the plaintiff, considering that he is the foreman of Mr. Bates's stables. He knew he was buying a

second-hand wagonette and did not expect to buy a first-rate article. If the Court holds that there was a guaranty, is the defect of sufficient importance to justify the action being brought? In any case in this action the plaintiff's proper course was to institute the *actio quanti minoris*.

The Chief Justice said: There is really not much conflict of evidence as to what took place at the time of the sale. The only point upon which the witnesses differ is whether either the word "warranty" or the word "guarantee" was used. The plaintiff says that the word "guarantee" was used, whereas the defendant denies having used either that word or the word "warranty." In the view which I take of the case it is immaterial whether or not there was an express warranty as to the soundness of the wagonette. The plaintiff was no expert as to wagonettes, and if incorrect statements as to quality were made to him before or at the time of the purchase he is entitled to receive back his purchase money if a material defect which was not readily ascertainable was subsequently discovered. The defendant candidly admits that before the conclusion of the sale he did say to the plaintiff that the wagonette was in good working order as he had been using it himself. In fact the wagonette was not in good working order, for if the forepart was turned beyond a certain angle jamming was certain to take place. This defect was not readily ascertainable, and it was so material that I am satisfied the plaintiff would not have concluded the purchase if he had been aware of the defect. The defect could perhaps be remedied by an expenditure of £8, but this would be such a considerable addition to the purchase price of £40, that the plaintiff could not reasonably be expected to incur the expense. The defendant has not tendered to remedy the defect, and the judgment of the Court must therefore be for the plaintiff with costs.

Their lordships concurred.

[Plaintiff's Attorneys, J. Ayliff; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

DISTIN v. LAMONT AND TRICK. { 1896. Dec. 7th.

Magistrate's jurisdiction—Summons—Specific performance.

Where it appears from a summons in a Magistrate's Court that the substantial object of the action is to obtain damages for a seller's breach of contract, the fact that the summons inappropriately states that it is for specific performance does not oust the Magistrate's jurisdiction.

This was an appeal from the decision of the Resident Magistrate of Adelaide.

The summons in this case called upon the appellant Distin to answer Peter Lamont and William Trick, trading together in co-partnership under the style or firm of "Lamont and Trick," merchants, of Adelaide (hereinafter styled the plaintiffs), "in an action to compel the specific performance of a contract." The summons continued: "And the said plaintiffs complain and say that heretofore, to wit on the 9th day of June, they the said plaintiffs purchased and bought of the said defendant at Adelaide certain five bags of mealies at the rate of £1 3s. per full bag, to be by said defendant delivered to them on the same day. And the plaintiffs further say that the said defendant, although often so demanded, neglects and refuses to deliver to them the said mealies, by reason of which neglect and refusal on the part of the said defendant they the said plaintiffs have suffered damage to the amount of £2 sterling, wherefore they pray that the said defendant may be adjudged to deliver to them forthwith the said mealies, and pay them the said sum of £2 as their damages as aforesaid, with costs of suit."

Defendant, before pleading, took exception to the jurisdiction of the Court to try an action to compel specific performance of a contract, such as is set forth in the summons.

The exception was overruled.

The defendant pleads "general issue."

Before the Resident Magistrate, Peter Lamont stated: I am a partner in Lamont & Trick, merchants at Adelaide, I know defendant in this case. On the 9th ulto., he sold me five

bags of mealies at £1 3s. a bag, to be delivered during the forenoon on the same day—he said they were on another man's wagon, and he could not deliver them until the bullocks came; he left, and subsequently came and said he had an offer of £1 4s. for them and I should have to give him the same. I told him I had bought them for £1 3s. and could not give more; he then said I might have them at £1 3s. 6d. I told him that I could not give him more than £1 3s. He then said he would deliver them, and asked me to send a truck for them, which I refused to do as he had agreed to deliver them at the store. I made a note at the time of the purchase (put in marked B) I was quite alone with the defendant when the agreement was made. I consider that I have sustained £2 damages owing to the non-delivery.

The following reasons were given by the Resident Magistrate:

In this case the defendant is sued in an action to compel specific performance of contract in respect of certain five bags of mealies, and for £2 damages for non-delivery of the said mealies. An exception was raised by the defendant to the jurisdiction of the Court to try an action to compel specific performance of a contract such as is set forth in the summons in this case. The exception was overruled, the Court holding that although the action to compel specific performance in this case cannot be entertained, as the subject matter of the contract is not specific enough, yet the Court has jurisdiction to take evidence and adjudicate upon that portion of the summons relating to the damages and in respect of which judgment for 1s. (one shilling) and costs was entered.

Mr. Graham, for the appellant: The Resident Magistrate was wrong in not allowing the exception. *Le Roux* v. *Golding* (5 Sheil, 393).

The Chief Justice: This case differs from that. That was for specific performance, but this is not.

Mr. Graham: But this is a summons for specific performance *and* damages.

The Chief Justice: Does not that *and* clearly mean *or* in this case: the summons is carelessly drawn.

Mr. Graham: But all the plaintiff had to go on was the summons—there is nothing in the latter part of the demand.

The Chief Justice: But if plaintiff wanted specific performance, *i.e.* wanted the mealies to be handed over, he would have had to tender payment of what he owed.

Mr. Graham: It is not for plaintiff to take this position—that it was not a claim for specific performance: he should have amended his summons.

The Chief Justice said: The Court has never required that summonses in Magistrates' Courts should be drawn with the same particularity as pleadings in this Court. Technical preciseness is not looked for, but the substantial meaning is considered. If certain words are used in a somewhat inappropriate sense the Court looks at the whole summons to see what was really intended to be conveyed to the defendant. In the present case the expression "specific performance" was wholly inappropriate. The plaintiff did not tender the price of the mealies and the substantial object of his action was to obtain damages for the defendant's failure to deliver the mealies. The case of *Le Roux* v. *Goldie* (12 S.C.R., 371) is not in point, for there the claim undoubtedly was for "specific performance" although these words were not used. The lessee of a windmill claimed in the Magistrate's Court that the mill should be delivered to him in terms of the contract of lease, and this Court held that the claim was beyond the jurisdiction. In the present case the Resident Magistrate in the Court below properly disallowed the exception to his jurisdiction and gave judgment for damages for an amount within his jurisdiction, and the appeal must therefore be dismissed.

[Appellant's Attorney, Gus Trollip.]

GABB AND FRASER v. GREENSHIELDS. } 1896. Dec. 7th.

Magistrate's Court — Postponement of trial—Appeal.

In an action in a Magistrate's Court against the drawers of a cheque the defendant's agent applied for a postponement on the ground that one of the defendants was not in a fit state of health to attend as a witness, and produced a medical statement which did not fully bear out the statement.

The Magistrate refused the application, whereupon the agent filed his plea and allowed the case to proceed.

Held, *on appeal against a judgment given in the plaintiff's favour, that the Magistrate's refusal to allow a postponement was not a good ground for the appeal.*

This was an appeal from the judgment of the Assistant Resident Magistrate of Cape Town.

In the action before the Resident Magistrate the respondent sued appellants for £23 11s. due upon and by virtue of certain dishonoured banker's cheque drawn by the defendants on

the 25th day of September, 1896, upon the Cape Town Office of the Standard Bank of South Africa (Limited), in favour of C. Skipper or order, and by him endorsed in blank, the plaintiff being the lawful holder of the cheque. On the case coming on for hearing the defendants' agent applied for a postponement on the ground that the defendant Fraser was not in a fit state of mind to conduct his business, and filed a medical certificate (marked A), unsworn.

The plaintiff's agent opposed postponement and the application was refused.

The defendant's agent then pleaded the general issue, denied all and several the allegations of the summons, and stated that plaintiff was indebted to defendants in the sum of £50, for a promissory note made and signed by him in favour of defendants, and that the said plaintiff having taken the note sued on with all its equities was strictly debarred from obtaining the judgment applied for.

The plaintiffs' agent put in the cheque and certificate of presentation and closed the case.

For the defence: The defendant's agent stated: I have had several consultations with defendant Fraser about this case. I am unable to get a coherent statement from him. I am satisfied that he has a good defence to this action; he is a material witness.

The doctor's certificate filed by the defendant's agent and referred to above (marked A) was as follows:

"I certify that Mr. Allen Fraser has been recommended by me to take a week or two's holiday, which is absolutely necessary for his health."

Judgment was given for plaintiff, the Acting Resident Magistrate remarking:

I was of opinion that no valid reason was shown for a postponement of the case, and that plaintiff being the legal holder of the cheque, was in the absence of any evidence for the defence entitled to judgment.

Mr. Graham for the appellants: This was a final judgment not a provisional one, there being appearance for the defendant, and a postponement therefore ought to have been granted in view of the medical certificate. Under Act 20 of 1856, Schedule B, section 28, judgment in such cases as this becomes final and cannot be reopened. Mr. Fraser was a material witness, in fact—the other partner not being in the Colony—he was the only witness.

Mr. Buchanan for the respondent: The decision on the note is final, but that on the question of postponement is interlocutory and therefore not appealable: *Queen* v. *Shaw* (6 Sheil, 70). See also section 33, Magistrate Court Act, No. 20 of 1856. The appeal is based solely on the question of the postponement, and virtually is an appeal on an interlocutory judgment. Moreover by Rule 19, Schedule B, Act 20 of 1856, there must be evidence on *oath* that a party is a material witness. Only the unsworn evidence of the doctor was produced. But the doctor's certificate is only a colourless one, simply advising that appellant should go for a holiday. The conduct of the appellant shows he was anxious simply to get the case postponed. Moreover this was a partnership debt on a note signed by Gabb & Fraser, but nothing is said as to Gabb's whereabouts.

Mr. Graham: By a long course of practice doctor's certificates are admitted unsworn. We tendered costs of postponement.

The appeal was dismissed.

The Chief Justice said: At the trial in the Court below the defendant's agent applied for a postponement on the ground that Fraser, one of the defendants, was not in a fit state of health to attend to his business and filed a medical certificate. That certificate is as meagre as it could possibly be. It says indeed that Fraser requires a holiday for a week or two, but it does not state what his ailment is or that it is such as to prevent him from attending as a witness. The Magistrate refused to grant the postponement, and after that the defendants' agent filed his plea and allowed the case to proceed. If he had withdrawn from the case it would have gone by default and might now have been reopened. After judgment had been given against the defendants an appeal was noted, and the defendants in support of the appeal now rely upon the Magistrate's refusal to postpone the trial. If there had been gross irregularity in the proceedings, the proper course would have been to bring the case in review on that ground. The appeal is upon the merits, and with the evidence before the Magistrate he was bound to give judgment for the plaintiff.

The appeal must be dismissed with costs.

[Appellants' Attorney, D. Tennant, jun.; Respondent's Attorney, J. Ayliff.]

SULLIVAN v. SUTTON. { 1896. Dec. 7th.

Boarding-house keeper—Lien—Luggage.

A boarding-house keeper, who includes in his charges for board and lodging a charge for custody of the boarder's luggage, is entitled to a lien upon such luggage, but has no right to assert the lien by taking possession of the luggage and preventing the boarder from having access to it while the boarder is still staying in the house and has made no attempt to remove the luggage.

This was an appeal from the decision of the Resident Magistrate of Cape Town.

The defendant (appellant in this Court) was summoned before the Resident Magistrate, Cape Town, to pay £13 11s. 6d., balance of account for "board and lodging, meat, drink, &c., found and provided."

The defendant disputed liability and filed a counter-claim for £20 damages for seizure of boxes.

The plaintiff in cross-examination stated that defendant had eight or nine spare boxes of luggage and that he showed defendant a place on the landing to put the luggage (there being no place in the defendant's room); that plaintiff afterwards in consequence of defendant not paying what was due removed the boxes and locked all the boxes up in another room—having no judgment or order of Court in his favour—and refused to give them up on demand, an account of the balance due to him not having been paid. Plaintiff's agent however offered access to the boxes to get any wearing apparel required.

Defendant alleged that in the boxes were many business papers which he could not get access to, and in consequence he was injured in his business.

The Resident Magistrate gave judgment for plaintiff for the amount claimed for board and lodging and dismissed the claim in reconvention.

The defendant now appealed.

Mr. Graham, for the appellant: It is against the judgment on the claim in reconvention that the appeal is brought. The rights which a lodging-house keeper has are laid down in section 26 of Act 20 of 1856, and he cannot simply lay hands on the goods and prevent their removal without an order of Court.

The Chief Justice: The section has no application, as it refers to premises which are in possession of the lessee. Here the boarding-house keeper has possession of the part where the goods are.

There was no appearance for the respondent.

The appeal was upheld without costs.

The Chief Justice said: It appears to me that this is not a case of lien at all, although the Magistrate has treated it as such. Assuming that the respondent had included in his charge for board and lodging a charge for the custody of the appellant's luggage, he would be entitled to a lien on such luggage, but he could not assert his lien by taking the luggage while the appellant was still in the house and detaining it against the appellant's will. He took possession of it for the purpose of preventing the appellant from having access before any attempt had been made by the appellant to remove himself or his luggage from the place, and this the respondent had no right to do. The Magistrate properly gave judgment in the respondent's favour for the board and lodging, but he ought to have awarded some damages to the appellant for the illegal detention of the boxes. What should be the amount of such damages? According to the evidence, the damage sustained was very trifling, and a shilling would have met the justice of the case.

In giving judgment for that amount on the appellant's claim in reconvention we see no reason for ordering the respondent to pay the costs of appeal.

[Plaintiff's Attorney, D. Tennant, jun.]

TROLLIP v. BEST. { 1896. Dec. 7th.

Barter—Verbal agreement—Condition precedent.

B. *proposed to exchange with* T. *certain heifers and an ox for thirty-two goats and a sheep, it being verbally agreed between the parties that if on delivery, which was to be made on a certain date,* T. *was not satisfied he could return the heifers and reclaim his goats.*

B. *failed to deliver the heifers and the ox on the appointed date, but succeeded in obtaining possession of* T.'s *goats and sheep.*

B., *some weeks after the appointed date, delivered the heifers and the ox, but* T. *refused to accept them.*

T. *sued* B. *for the restoration of his goats and sheep.*

The Resident Magistrate, after hearing T.'s *evidence, granted absolution from the instance, on the ground* inter alia *that no contract had been alleged in the summons and therefore no breach.*

On appeal, *the Court remitted the case to the Magistrate to be tried on its merits.*

This was an appeal from a decision of the Resident Magistrate, Albert.

The summons called on the respondent to show cause why he had not delivered to the plaintiff certain thirty-two goats and one sheep, of the value of £11 11s., or thereabouts, the property of the plaintiff, of which the defendant had wrongfully and unlawfully possessed himself, and illegally detained from the plaintiff, and plaintiff further claimed the sum of £8 9s., as

damages sustained in consequence of such wrongful act of detention: and plaintiff claimed restoration of the property or its value.

Defendant pleaded the general issue.

The plaintiff gave evidence that the defendant Best proposed an exchange of certain heifers and an ox, belonging to Best, for thirty-two goats and sheep; but that if on delivery of the heifers (which was to be made on a certain date), plaintiff should not be satisfied with them, he could return them to Best and get his goats and sheep back. Best received the sheep and goats, but subsequently on delivery of the heifers to plaintiff (some weeks after the proper date) the latter was dissatisfied with them, refused to accept them, and demanded redelivery of his goats and sheep. The respondent refused to redeliver them.

The contract was a verbal one.

Defendant applied for absolution from the instance, which was granted by the Court: the Resident Magistrate remarking:

The Court allows absolution from the instance, as there is no proof that defendant wrongfully and unlawfully possessed himself of the stock, and no contract is alleged in the summons and therefore no breach of it. Absolution granted with costs.

Against this decision the present appeal was brought.

Mr. Graham appeared for the appellant.

Mr. Innes, Q.C., for the respondent.

The Chief Justice said: The Court below had only the plaintiff's evidence before it, and according to that evidence there was no complete exchange. The contract was only to be completed in case the plaintiff was satisfied with the cattle which were to be tendered by defendant in exchange for the goats. On the day when the cattle ought to have been brought they were not brought, but the messenger sent by the defendant claimed the goats without any authority. The plaintiff had said that the goats were not to be delivered until he had authorised the delivery. It was therefore almost by trick that defendant gained possession of the goats. Now the action is brought to recover the goats unlawfully and improperly taken. It is for the defendant to rely upon the contract; plaintiff was not bound to set up the contract. He said the goats were improperly taken, he gave no authority for taking the goats, and said that defendant in the first instance must return the goats. It is possible, if the case for the defendant had been heard, he would have been successful, but on the evidence before the Magistrate the plaintiff was entitled to succeed therefore the Magistrate ought not to have given absolution from the instance. It is a pity that the Magistrate did not hear the merits of the case, and it must be remitted to him to be tried on the merits. The appeal must be allowed with costs in this Court. The costs in the Court below will have to be costs in the cause.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys Messrs. Walker & Jacobsohn.]

IN THE INSOLVENT ESTATE OF VAN WYK. { 1896. Dec. 7th.

Interdict—Crops.

Interdict granted restraining the alleged lessees of a farm from reaping the crops, the lease being alleged to have been granted mala-fide *by the lessor, who had subsequently become insolvent.*

This was an application upon the petition of Nicholas Solomon Louw in his capacity as trustee in the insolvent estate of William van Wyk, sen., for an order preventing the alleged lessees of a farm (mortgaged to creditors) from harvesting the crops, and ordering the trustee to do the same.

Mr. Schreiner, Q.C., applied.

The petition set forth:

1. The said insolvent estate wherein petitioner was duly elected and confirmed in his appointment as the sole trustee thereof was lawfully placed under compulsory sequestration provisionally on the 9th day of March, 1896, and finally on the 13th day of April, 1896.

2. Among the assets of the said insolvent estate, or belonging thereto in the said district, is the place or farm called Boventuin or (according to the deed of transfer executed at the office of the Registrar of Deeds in Cape Town in favour of the said insolvent on the 8th day of May, 1872) the remainder of the places or farms called Matjesfontein and Avontuur, *alias* Bloemfontein, which at a sale publicly or privately will not fetch more than the sum of £1,000.

3. On the 14th October, 1895, the said insolvent pretended to let the said place or farm to his son Willem Jacobus van Wyk, jun., and to his daughter-in-law Martha van Wyk (born Nel), married without community of property to his son Gert M. J. van Wyk, both of Boventuin aforesaid (hereafter called the alleged lessees), who took and hired it from the said insolvent for a period of six years reckoned from the 15th October, 1895, at a rent of £20 a year, payable half-yearly on the 14th April and 14th October in every year, on condition *inter*

alia that if the alleged lessees keep the stipulations of and in the so-called contract of letting or hiring they shall have the full and undisturbed possession of the said place or farm during the aforesaid term.

4. Annexes true translation of the agreement.

5. The said farm was duly and lawfully hypothecated by the said insolvent at different times before his insolvency under and by virtue of three several mortgage bonds still unsatisfied, to the extent without the interest due for and since the year 1894 of £1,325, which bonds have been duly proved against the said insolvent estate.

6. The interest yearly payable on the said bonds which were respectively passed on the 12th June, 1876, on the 16th August, 1882, and 9th December, 1884, amounts to £36 15s.

7. To date, no rent has been paid him by the alleged lessees.

8. On the said place or farm there are now crops of wheat, rye and otherwise, of the value of £75 or thereabouts, to be harvested by or before the end of this month.

9. In the interest of the said insolvent estate it is essential that the said crops shall not be harvested, removed, and realised by the alleged lessees, or by any other person whomsoever who with the consent of the said insolvent might in terms of the said so-called contract have lived on the farm; but by him, the said trustee alone, for the benefit of the said insolvent estate.

10. Unless it is so done by him he will be unable to recover the proceeds thereof, and consequently he will be remediless in the premises.

Wherefore he prays for an order:

(*a*) Restraining the alleged lessees and the person or persons aforesaid from harvesting, removing and realising the said crops.

(*b*) Authorising him to do the same.

(*c*) Directing him if need be to retain the proceeds thereof until a further order, or pending an action to claim same, and at the same time if the alleged lessees will not quit the said place or farm to set the so-called contract aside and eject them therefrom, because the so-called contract is not genuine, on the grounds of non-payment of rent, and that it is prejudicial to the prior mortgage bonds, or that he may have such other relief as the Court will grant.

In addition to the provisions mentioned in the petition the memorandum of agreement of lease provided that the lessees should pay all taxes, including the quitrent payable to Government, and should keep in good order the dwelling-houses and other buildings with kraals and camp walls,

The Chief Justice said: The Court is not in a position to allow the trustee to enter upon the property for the purpose of harvesting the crops until the lessees have had the opportunity of being heard. The Court will grant a rule calling upon these lessees, or alleged lessees, to show cause on the 22nd inst. why the trustee shall not be allowed to reap the crops; and in the meanwhile will grant an interdict restraining the respondents from removing from the land any portion of the crops.

[Applicant's Attorney, S. J. Mostert.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

MTHUSTHEA v. MSWELO. } 1896. Dec. 8th.

Title to land—Jurisdiction—Magistrate's Court Act—Native Location.

A Magistrate's Court has jurisdiction in an action for trespass on Crown Land, in a native location instituted by a native, who is in actual occupation under leave and licence from a Government official, against another native, who claims the right of occupation by virtue of prior user for a long period.

This was an appeal from the decision of the A.R.M. of King William's Town at Keiskamma Hoek.

The action was one for trespass, defendant having gone on to plaintiff's land and ploughed it up, damages to the extend of £1 were claimed with costs and allowed by the Magistrate. The land was situated in a native location. The defendant alleged that for thirty-two years he had been in possession of the land. The plaintiff stated that he had had the land pointed out to him by a police official, and had occupied and cultivated it up to the date of the trespass.

The defendant was summoned before the Resident Magistrate, Middledrift to answer a claim for damages for trespass on land at Debe (in the lawful possession and occupation of plaintiff), with oxen and a plough,

The defendant pleaded:

1 Occupation of the land for thirty years.

2. That he had been deprived of possession by a policeman, sent out as alleged by the Resident Magistrate, Keiskama Hoek, which act was informal, irregular and illegal.

3. On re-entry and taking possession of the said land, the defendant acted in his legal rights and committed no trespass.

The Resident Magistrate in his reason found that it was proved that plaintiff had been in undisturbed possession of the garden land, in Mlemi's Location for about three years regularly ploughing; that defendant trespassed as alleged, and that the damages were at least £1; that all the land in the location was held on communal tenure as Crown Land, under Acts 37 of 1884 and 33 of 1892; that plaintiff acquired the garden in a legitimate manner; it being allotted three years ago, under the Secretary of Native Affairs' circular No. 1 of 1890, issued under section 29, Act 37 of 1884; that plaintiff had only the one garden (viz. the one in question), while defendant had three plots, though defendant and plaintiff each paid the same amount on hut tax; and that when the land was assigned to plaintiff, the defendant willingly handed it over to him and allowed him to deal with it for three years.

Mr. Graham for the appellant: Act 27 of 1884 section, 7, defines "location on Crown land." The land does not belong to plaintiff, and he could not bring an action for trespass on land which was not his own.

The Chief Justice: But possession is a sufficient title to justify an action for trespass; you don't want to prove ownership. The question is, has the Resident Magistrate jurisdiction? Is the title in dispute?

Mr. Graham: See *Mombaka* v. *Sheshuba* (6 E.D.C., p. 167.) To some extent title is involved though natives in location have strictly no title; they have a very precarious tenure. Our plea is that we have occupied for thirty-two years and plaintiff had no right to eject, as he practically did.

The respondent was not represented.

The appeal was dismissed with costs.

The Chief Justice said: If in this case the title to any land or tenement were in question the Magistrate would clearly have no jurisdiction, but after hearing the summons and evidence read I am satisfied that only the right of occupation is in question. The land is in a native location and belongs to the Crown. The defendant claims the right of occupation by by virtue of a long user until three years ago, but he does not claim any title or the right to obtain a title from the Crown. The plaintiff claims the right of occupation by virtue of his having been in possession during the last three years under leave and licence from a Government official. Being in actual and lawful occupation he brings an action for trespass against the defendant, who has begun to plough the plaintiff's cultivated land. In what sense then can the title to the land be said to be in question? In answer the Court has been referred to a case in the Eastern Districts Court, where the case of *De Kock* v. *Du Toit* (3 Searle, 228) was cited, but the latter case certainly does not support the defendant's exception to the jurisdiction of the Magistrate. There was a dispute as to the boundaries of the farms, and the owner of the one having sued the owner of the other in the Magistrate's Court for trespass the Supreme Court of course held that the inferior Court had no jurisdiction. The judgment in the Eastern Districts Court case also seems to have proceeded upon the assumption that the ownership and not the mere right of occupation was in dispute, for the learned Judge-President observes that "the plaintiff states that he is one of the owners."

Be that as it may, I am clearly of opinion that, in the present case, neither ownership nor right to have title or transfer, or ownership is in dispute and that therefore the appeal must be dismissed.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

HERTZOG v. WEBSTER. } 1896. Dec. 12th.

Mr. McGregor applied for provisional sentence on a mortgage bond for £800, with interest at the rate of 6 per cent. from April 1, 1895.

Granted.

LENG v. NESTADT.

Mr. Graham applied for official sequestration of the defendant's estate on a provisional order granted on November 12 by Mr. Justice Buchanan.

Granted.

SCANLEN AND SYFRET V. DE VILLIERS.

Mr. Close applied for provisional sentence, with costs, upon a cheque for £100 drawn on the Standard Bank at Willowmore.

Granted.

ADMISSIONS.

Mr. Allen Ross Welsh and Mr. George Christian Vosloo were admitted to practise as attorneys and notaries, the oath to be taken in the first case at Graham's Town, and in the second at Bedford; Mr. John Griffiths Harsant was admitted to practise as attorney and notary and conveyancer.

REHABILITATIONS.

Mr. Graham applied for the rehabilitation of Paul Jacobus Albert du Plessis.

The application was refused, with leave to apply again in three months.

Mr. Graham applied for the rehabilitation of Lodewicus Daniel Vosloo.

Granted.

Mr. Tredgold applied for the rehabilitation of Elizabeth Catherina Klosser.

Granted.

Mr. Graham applied for the rehabilitation of Philip Rudolph Goedhals.

Granted.

Mr. Graham applied for the rehabilitation of Johannes Gerhardus Naude.

Granted.

GENERAL MOTIONS.

THE PETITION OF ERNEST C. K. BARTENS AND WIFE.

Mr. Buchanan moved for authority to the Registrar of Deeds to amend the entries relating to the registration of the ante-nuptial contract entered into between the parties, in which the name of the second petitioner is erroneously described as Bockel instead of Mockel.

Granted.

THE PETITION OF WILLEM J. SMIT.

Mr. Graham moved for a rule *nisi* requiring the executrix testamentary of the estate of petitioner's parents to show cause why he shall not be admitted to sue her *in formâ pauperis* in an action to compel her to transfer to him the share of the farm Stofkraal, in the district of Fraserburg, bequeathed to him by his parents.

The application was granted, the rule to be made returnable on January 22.

IN THE MATTER OF THE MINORS LABUSCAGNE.

Mr. Buchanan moved for authority to the mother of the minors to raise a sum of money on mortgage of the farm Bamboeshoek, in the district of Wodehouse, to enable her to satisfy the liabilities of the joint estate of herself and deceased husband, and to continue to work the farm for the support of herself and the said minors.

Granted.

THE PETITION OF FANNY L. WOLSTONE.

Mr. Tredgold moved for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The application was granted; personal service to be effected if possible, failing which one publication in a Middelburg paper; the order to be made returnable on February 1.

IN THE INSOLVENT ESTATE OF GERT H. MEYER.

Mr. Graham moved for an order removing Thomas Sheard from his office as one of the trustees of the said estate, he having disappeared and his whereabouts being unknown, or otherwise for authority to Christian M. Lund, the remaining trustee, to act alone in effecting transfer of land from the said estate to the purchaser.

Granted.

THE PETITION OF CUTHBERT S. SKEAD AND WIFE.

Mr. Searle, Q.C., moved for an order authorising the Registrar of Deeds to register a post-nuptial contract to be entered into by petitioners, embodying certain settlements made in England and executed in a deed which they were informed would have the effect of an ante-nuptial contract.

Granted.

MAIN V. CHATTERTON.

Mr. Searle, Q.C., appeared for the defendant. This was an application by the defendant for leave to sign judgment against the plaintiff in the suit instituted by him for the recovery of damages for alleged slander by reason of his failure to proceed with the action within the time required by the rules of Court.

Granted.

Ex-parte FLATHER. } 1896.
Ex-parte VAN PELT. } Dec. 12th.

Translator—Women—Public Office.

A woman is admissible as translator of the Supreme Court.

These were the petitions of Gertrude Flather and Sophia van Pelt for orders authorising the examination of the petitioners as to their proficiency in the French, English and Dutch languages respectively, and thereafter for their admission as translators to the Court upon a satisfactory report from the examiners.

Mr. Graham appeared for the applicants, and in support of their claim quoted as follows from *Voet's Pandects* (1, 5, 1): "For although often, and indeed in by far the most branches of our law, men and women have the same rights, so that what is said of men and is laid down as to the male sex is also extended to women, if nothing else is provided by law, still in some respects the condition of women is found to be better and in some respects worse than that of men. It is better in so far as they rejoice in the benefit of *Senatus Consultum Velleganum;* in so far as in very many cases any ignorance of the law under which they labour does them no harm, and in so far as they are more leniently punished for crimes than men are. Their condition is worse, since they cannot be magistrates nor fill any public or other civil offices." He said that this, however, could scarcely be taken to bear against the applicants. He had searched the authorities further and found the following passage in *Van Leeuwen's Roman-Dutch Law:* "Likewise owing to natural peculiarity it happens that inasmuch as nearly the whole of womankind, by reason of an inborn weakness, is less suited for matters requiring knowledge and judgment than men, women are excluded from holding any office or dignity relating to the government of a people and its affairs. And because, further, they have been found incapable of managing either themselves or their property with proper discretion and even frequently act contrary to their own interest, women have of old already been placed under the power and tutelage of men, as possessing more wisdom, and to whom it belongs to govern the weaker sex." Those were really all the authorities which could be found to bear on the point, and he submitted that even if the position of translator was considered a public or civil office, the Court would not apply that extreme view nowadays, seeing that the position and status of woman had altered so very largely since the days of Voet and Van Leeuwen. The applicants were ladies highly qualified for the posts they applied to fill, and he trusted that the application would be favourably considered.

The applicants were admitted to examination.

The Chief Justice said: It is said by *Voet* (1, 5, 1), that women cannot legally act as magistrates or be employed in other public or political offices. It may be a question whether this *dictum* is applicable, without any qualification, to this country at the present time, but even if it be so applicable. I am satisfied that the office of translator to the Supreme Court is neither public nor political, in the sense intended by *Voet*. The order for the examination of the petitioner will therefore be made and Mr. Watermeyr appointed as examiner to assist the Court.

THE PETITION OF THE CONSISTORY OF THE DUTCH REFORMED CHURCH OF CAPE TOWN. } 1896. December 12th.

Mr. Innes moved for authority to the Registrar of Deeds to allow transfer by the said Church to the Huguenot Memorial Committee of a certain portion of the land granted to the said Church in the years 1755 and 1801 for burial purposes, such land being no longer used for such purpose, and it being desirable that it should be dealt with as proposed, and the purchase price applied for the furtherance of the objects of the said Church.

Mr. Sheil appeared on behalf of the Government and asked for a postponement of the case.

The Court granted a rule *nisi* returnable on December 22, calling upon the Government and all parties concerned to show cause why the prayer of the petitioners should be granted, the rule to be published once in "Ons Land."

IN THE MATTER OF THE MINORS LOUWRENS AND POTGIETER.

Mr. Graham moved for the appointment of *curators ad litem* to represent the said minors in an action about to be instituted for a declaration of rights and damages in connection with certain water rights on the Buffalo River in the district of Oudtshoorn, and an order for the attachment of the landed property of one of the defendants, who is absent from the Colony *ad fundandam jurisdictionem* of this Court, with leave to sue by edictal citation.

The Court granted the application, and appointed Mr. Arderne, sen., as *curator ad litem*, with authority to appoint an independent counsel to act for the minors. The order for the

attachment of the landed property was granted, returnable on February 1, personal service to be effected.

THE PETITION OF ADAM MARNEWICKE.

Mr. Graham moved for a rule *nisi*, requiring the South African Mutual Life Assurance Society to show cause why applicant shall not be admitted to sue *in forma pauperis* in an action for the recovery of an amount which became due on a life policy on petitioner's wife, she having died in May, 1896.

The application was granted, the rule to be made returnable on February 8.

IN THE MATTER OF THE MINOR VISSER.

Mr. McGregor moved for the appointment of a *curator ad litem* to represent the said minor in an action about to be instituted in the form of a special case for a declaration of rights as to certain farm known as Paapkuilsfontein, in the district of Piquetberg, bequeathed to the sons of the late Jacobus K. Visser and predeceased spouse.

The application was granted, Mr. McGregor to act as *curator ad litem*.

IN THE ESTATE OF THE LATE ELIZABETH ANN DAVIES. } 1896. Dec. 12th.

Minors—Holograph will—Usufruct.

A. *by a will in her own handwriting (but not attested) bequeathed her property to her husband to "use in trust for her children."*

The husband retained the furniture, advancing money from his own funds to pay the debts of the estate.

The Master refused to recognise the will as valid without an order of the Court and called on the executor to realise the furniture, &c., and pay the amount into the Guardians' Fund.

The Court, *on the application of the executor to have the will declared valid, declined to make such an order until the minors were represented by a curator; but authorised the husband to remain in possession of such of the furniture as was not required to pay the debts of the estate.*

This was the petition of R. Shaw Smith, in his capacity as executor dative of the estate of the late Elizabeth Ann Davies (born Cogan).

The petition set forth that the late Mrs. Davies left a will in the following terms:

"I, Elizabeth Ann Davies, give and bequeath all I may possess at my death to my husband George V. Davies to use in trust for my children; but should he marry again the life policy, house property, furniture, &c., in my name to be used solely for my children's benefit.

"(Signed) E. A. DAVIES."

There were no witnesses to the will.

This will was duly filed with the Master.

The petitioner stated further that after satisfying the bond on the landed property there remained in the estate the furniture only, valued at £160.

That to avoid the sale of the furniture, the said G. V. Davies paid the executor the difference between the amount available for distribution and the value of the furniture, viz. £35 5s. 3d.

That the furniture has since remained in the possession of G. V. Davies, in terms of the will, and that the said Davies has provided for the minor children.

That were such furniture to be disposed of, it would not realise much, for such realisation would force the said Davies to re-furnish, in order to provide a comfortable home for the minor children, of whom there are six, whose ages vary from eighteen to eight years.

That the life policy mentioned in the will had lapsed prior to the death of the testatrix.

That after the death of the testatrix, petitioner, as executor dative, received an inheritance of £68 4s. 4d. from the estate of J. J. and A. Cogan.

That petitioner paid this inheritance into the Guardians' Fund, by order of the Master, who refused to recognise the will as valid without an order of Court.

That the said Davies alleges he requires this money for the maintenance of the minors.

That the Master has also called on petitioner, either to get such order or to pay the minors' portions into the Guardians' Fund, which would necessitate the sale of the furniture: which would be detrimental to the interests of the minors.

That it would be for the interests of the minors that the will be declared a valid one, and the petitioner prays for an order declaring the will valid and ordering the Master to register it as such, and to pay the sum of £68 4s. 4d. to the said G. V. Davies for the purposes mentioned.

There was an affidavit by G. V. Davies, corroborating the facts above stated: declaring

that the will was in the handwriting of the testatrix, and that he had consulted his children who wished the course now taken to be adopted; that he had great difficulty in paying the amount he had paid to save the furniture from being sold.

The Master's report was as follows:

Although the will is not attested it requires nevertheless to be registered in terms of section 7 of Ordinance 104: it is for the Court to decide as to its validity. Nothing, however, was done at the time to obtain the decision of the Court, and the petitioner was elected executor dative.

The landed property has been sold for the amount of the bond over it. The residue of the estate consists of furniture valued at £160, and there were further claims against it, amounting to £35 5s. 3d. which have been paid by the surviving spouse, who would have been allowed to take over the rest of the furniture.

It would have been competent then for the Master under section 11 of Act 27 of 1895 to deal with the £68 4s. 4d., and other small sums paid into the Guardians' Fund to the credit of the minors, if he had been approached in the matter.

This was pointed out to the petitioner two months ago (on the 16th October, 1896) and it is a pity so much expense should have been incurred to such a small estate: but the object of the applicant is to have the will upheld in order that the surviving spouse may retain possession of the rest of the estate. I have not been informed whether the parties were married in or out of community.

[The parties were married out of community. —REP.]

Mr. Close for the petitioner: The will is a valid one in view of the cases *Steer's Executor* v. *Master* (5 Juta, 313); *Ex-parte De Wet* (Buch., 1875. p. 219); *Eaton's Executor* v. *Eaton* (Buch, p. 173). As in *Steer's case*, it is true that there is a usufructuary interest in favour of the survivor, but the essential point is that the entire *dominium* is vested in all the children. The will indeed was filed in the Master's Office and treated as a valid one—so that the accounts were filed with the then Master: but on the matter coming before the present Master in connection with the Cogan bequest, he raised the present objections. The will is clearly a valid holograph will, requiring no witnesses: and it is for the minors' benefit that the proposed orders should be made.

The Chief Justice: The Court will make no order on the present application as to the validity of the will until the minors are represented before the Court by a Curator. The Court will, however, allow the father to retain possession of all such furniture as is not required to pay the debts and he will be entitled to recoup himself from the furniture for the advances made by him in paying the debts. Costs of the present application to come out of the estates.

[Petitioner's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

WOODHEAD, PLANT AND CO. v. PETERSEN AND CO. { 1896. Dec. 21st.

District Registrar—Summons—Provisional sentence—Rule 327.

A Magistrate's Clerk has no authority, under Rule 327, to issue a summons for provisional sentence.

In this case the summons, which was a provisional one, was returnable on the 12th inst., but stood over on the point raised by the Registrar of the Supreme Court that the Clerk of the R.M. Court for Tulbagh, who signed the summons as District Registrar of the Supreme Court, had no power to do so, his jurisdiction being confined to illiquid summonses as provided for by Rules 326 and 327.

De Villiers, C.J.: The attention of the Court has been directed to the fact that the summons is signed by the Magistrate's Clerk of Tulbagh, and not by the Registrar of the Supreme Court. If the summons had been to compel the appearance of the defendant in terms of the 326th Rule of Court there can be no doubt that, by virtue of the 327th Rule of Court, the signature of the Magistrate's Clerk would have been quite in order. But the summons is for provisional sentence under the 12th Rule of Court. Until March, 1880, when Rule 327 was promulgated, there were no District Registrars of the Supreme or Eastern Districts Court. That Rule directs that Clerks of the Resident Magistrates shall be District Registrars, but only for the purpose of issuing any such summons as is mentioned in Rule 326. But

rule 326 leaves summonses for provisional sentence untouched. It repeals Rule 11 and substitutes a new rule for it, but it makes no reference whatever to Rule 12. It would perhaps be well to frame a new Rule of Court giving the District Registrars the requisite jurisdiction, but until that is done they have no authority to issue summonses for provisional sentence.

Mr. Justice Buchanan: I stated my opinion in the case of *Hirschman* v. *Wagner* (5 E.D.C., 93), when the case was decided by a majority of the Eastern Districts Court. On reconsideration I see no grounds for altering the opinion I then expressed. I therefore concur.

Mr. Justice Maasdorp: I adhere to my decision given as one of the majority of the Eastern Districts Court in the judgment in the case of *Hirschman* v. *Wagner*. Rule 11 provided for the manner in which the common process of this Court in all simple original actions, when by law there can be no arrest of the defendant, shall be directed, served, and returned to the Court. Rule 12 merely gives the form of summons in cases where a claim is made for obtaining provisional sentence, without any reference to the way in which it is to be directed, served, and returned. Rules 13 and 14 make provision for summonses in case of arrest, and also direct the mode of service by the sheriff. The only material distinction made in these rules is that between a summons in a simple original action, and that in case of arrest. The former cases all fall under Rule 11, except that a different form of summons is provided for by Rule 12 in provisional cases. If that were not so there would be no provision for the service and return of summonses in provisional cases. Then Rule 326 took the place of Rule 11, the effect of it being mainly to simplify the form of summons. Rule 327 makes provision for the issuing of process under Rule 326, but, as it seems to me that Rule 12 was virtually embraced except as to form under Rule 326, the provision of Rule 327 will apply also to process in provisional cases.

His lordship therefore dissented.

[Plaintiff's Attorney, C. C. Silberbauer.]

DIVISIONAL COUNCIL, ABERDEEN, v. TRUTER. { 1896, Dec. 21st.

To make absolute the rule *nisi* restraining the respondent from selling, transferring, mortgaging, or in any way alienating erf No. 15, block D, in the town of Aberdeen, pending the decision of action to be instituted to have it declared that the said erf is the property of Philip A. Mare.

Mr. Graham appeared for the applicant; Mr. Innes, Q.C., appeared for the respondent.

The Chief Justice: There may be information before the Divisional Council which would enable them to succeed in their action against the respondent, but they have certainly not given that information to the Court. I think, from the information before us, that we ought not now to make the rule absolute, and the rule ought to be discharged with costs. But the Court will reserve to the applicants the right in any action which they may be advised to take against Truter to recover any costs which may now be paid.

REGINA V. ELIAS BLUMENTHAL. { 1896. Dec. 22nd.

This was an appeal from the conviction of the accused before the Resident Magistrate of Tulbagh.

The appellant was charged with contravening section 75, Act 28 of 1883, by selling to one Joseph Carl Pedersen intoxicating liquors (to wit, half a leaguer of wine) without having a licence as required by law.

The prisoner pleaded not guilty.

During the hearing before the Resident Magistrate it was alleged by Pedersen that he took over the Station Hotel from Mr. De Vries; that this hotel was formerly occupied by Blumenthal & Co., who held liquor and general dealer's licences; that the liquor licence was transferred to Pedersen on the 6th November; that Blumenthal, on application by Pedersen, removed two leaguers of wine belonging to himself from the Station Hotel to his new store, started about 300 yards away; and that Blumenthal subsequently (on the 14th) sold some of the wine to Pedersen.

The defendant alleged that the wine had been sold to Pedersen when the latter took over the hotel on the 22nd October, and was removed to Blumenthal's store merely for storage purposes at Pedersen's request. In support of these statements he referred to the debit entries in his books against Pedersen.

The prisoner was found guilty and sentenced to pay a fine of £10, and the liquor was confiscated.

The Resident Magistrate's reasons were as follows:

In this case I arrived at the following conclusions:

1. That the sale of the half-leaguer of wine between the accused and Pedersen actually took place on the 14th November, 1896.

2. That 23¼ half-leaguers of liquor were found on the premises of the accused, licensed only as a general dealer's shop.

3. That the witnesses for the defence were all (except one) interested.

Mr. Graham for the appellant.

Mr. Sheil, Acting Attorney-General, for the Crown.

The Chief Justice said: It is really essential that we should have more information with regard to the books. Everything depends upon the question, whether the entries are *bona fide* or not. The Court will put a question to the Magistrate as to whether he would have found as a fact that these entries are true or not, and we should like also to see the books, which the appellant will please produce to the Registrar of the Court.

Postea (December 22nd).

The Chief Justice said: The Court directed the Resident Magistrate who tried the case to forward his opinion upon the question of the genuineness of the books, and they also ordered the appellant to forward his books to the Registrar. It is unnecessary to wait for the opinion of the Resident Magistrate, as the Court has had an opportunity of inspecting the books, and have come to the conclusion that the entry on the 22nd October was a genuine one. That being so, it follows that the appellant must have believed that the sale took place on the 22nd October. Then the receipt put in is "on account," and the amount paid (£5 10s.) is exactly half the amount of the price for which the two half-leaguers were said to have been originally sold. The evidence of the witness Pedersen was very unsatisfactory, and he is contradicted on two important points by other witnesses, one of whom is the Justice of the Peace who issued the warrant. The conviction must be quashed, and the confiscation of the liquor seized set aside.

[Appellant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

IN THE MATTER OF THE LUNATIC ISAAC LEWIS. { 1896. Dec. 22nd.

Mr. Stoney applied for authority to the curator of the property of the lunatic to realise the assets in the estate by public auction or otherwise, and to pay off the liabilities, and apply the balance towards the maintenance and support of the patient, who is at present in the Graham's Town Asylum.

Order granted in terms of the suggestions in the Master's report.

GROBBELAAR V. GOUS.

Mr. Searle, Q.C., applied for an extension to February 1 of the return day of the edictal citation authorised to be issued in the suit between the parties, in which applicant seeks to recover the balance of an amount due on a promissory note.

Extension granted.

REGINA V. MOHR. { 1896. Dec. 22nd.

Trial by jury—Remit under Act 43 of 1885—Competency of Magistrate to try case—Acting Chief of Police.

Where a case has been remitted to a Magistrate for trial under Act 42 of 1885, the accused cannot demand to be tried by a jury. The mere fact that the Magistrate, who presided at the preliminary examination and afterwards tried the prisoner, was Acting Chief of Police during a portion of the time occupied by the preliminary examination, but who took no part in the prosecution, Held, *not sufficient to render such Magistrate incompetent to try the case.*

This was an appeal from a sentence of ten months' imprisonment with hard labour passed upon the appellant, a member of the Cape Town police force, by the Assistant Resident Magistrate of Cape Town.

The following charges were brought against the appellant:

1. In that he did on or about the 22nd day of July, 1896, at Camp's Bay, in the said district, wrongfully and unlawfully break and enter the Camp's Bay Hotel with intent the goods there being to steal, and then and there stole 500 cigarettes, 200 cigars of various brands, seve al bottles of whisky, brandy, and port wine, and several bottles of champagne, the property or in the lawful possession of one Hans Heide, an hotel proprietor.

2. As also that he did on or about the 6th April, 1896, at Camp's Bay aforesaid, wrongfully and unlawfully steal money amounting to £13, a 20-dollar American gold piece, a £5

Jubilee piece, a silver pendant containing 1s. in money, a pair of diamond earrings, two 20-mark gold pieces, £10 in money, some gold studs, and various other coins, the property or in the lawful possession of Edward Nathan, an hotel proprietor.

3. Also that he did some day between 23rd and 31st March, 1896, at Camp's Bay aforesaid, wrongfully and unlawfully steal a set of gold links, the property or in the lawful possession of Lionel Orpen, a clerk.

4. Also that he did during the month of March, 1896, at Camp's Bay aforesaid, wrongfully and unlawfully steal a gold scarf-ring, the property or in the lawful possession of one Frederick Simon.

5. Also that he did during the month of December, 1895, wrongfully and unlawfully steal a silver watch-chain and a Waterbury watch with a coin attached, the property or in the lawful possession of one Samuel Nathan.

The case having been remitted by the Attorney-General to be tried by the Resident Magistrate under Act 43 of 1885, by letter dated 18th of September, 1896, and received 19th September, 1896, the prisoner was this day (25th September) arraigned under section 29 of Act 3 of 1861.

Before the prisoner pleaded his agent applied for a postponement to some date subsequent to the 12th October, 1896, on the ground that application was being made to the Supreme Court for the removal of this case to that Court for trial.

Application refused.

Prisoner's agent then applied for a postponement to enable the accused to apply to the Supreme Court for an interdict to restrain the Resident Magistrate's Court from trying the case pending the decision of the Court in the matter above-mentioned.

Application refused.

Prisoner being arraigned, refused to plead. Court records the plea of not guilty.

The evidence taken at the preliminary examination read.

Prisoner's agent applied for a postponement for one week to call witnesses.

Remanded for one week to the 2nd October.

On the 29th September the following petition was presented to the Chief Justice in chambers:

The Petition of Jacob Mohr, of Retreat, district of Wynberg,

Humbly showeth:

1. That your petitioner is a British subject, and until the 31st day of July, 1896, was employed as a police-constable in the service of the Cape Colonial Government, and has been stationed at Camp's Bay for the last nine months.

2. That on the 31st day of July, 1896, your petitioner was ordered to appear before the Chief of Police in Cape Town in connection with a reported case of theft at Camp's Bay, in which it was said your petitioner was implicated.

3. That your petitioner came to Cape Town, when he was apprehended without a warrant and detained in custody until the 3rd of August, 1896, when he was brought before George Black, stone Williams, Esq., Assistant Resident Magistrate of Cape Town, and a preliminary examination was commenced.

4. That several postponements took place thereafter, and on the 19th day of August, 1896, further evidence was taken, and your petitioner was on that date committed for trial by the said George Blackstone Williams, Esq.

5. That on the said 18th day of August, 1896, and some time before this period, the said George Blackstone Williams, Esq., was acting in Cape Town as Chief of Police, and which position he continued to fill until the 21st day of September, 1896.

6. That as such Acting Chief of Police, the said George Blackstone Williams, Esq., was intimately acquainted with all the details of the prosecution against your petitioner, and the nature of the evidence to support such prosecution, if not bound to prepare the necessary evidence for the Crown.

7. That your petitioner has been served with an indictment and notice of trial to appear before the said George Blackstone Williams, Esq., on Friday next, the 25th day of September, 1896, the case against him having been remitted by Her Majesty's Attorney-General for trial under Act 43 of 1885.

8. That when your petitioner was committed for trial, he desired in his statement that if indicted he might have the privilege of trial by jury; and on the 27th day of August, 1896, your petitioner caused a letter, whereof a copy is hereunto annexed marked "A." to be sent to Her Majesty's Attorney-General wherein the same wish was expressed.

9. Your petitioner respectfully submits that there will be no saving of expense by a remission of the case to the Resident Magistrate's Court in Cape Town, as all the witnesses, your petitioner is informed, for prosecution and defence, will have to be subpœnaed in like manner as on his trial before a jury.

10. Your petitioner declares that he is not guilty, and respectfully submits that if he is to

have a fair and impartial trial, it should be by a judge and jury, who have been altogether free from the prosecution in his case.

Wherefore your petitioner humbly prays this Honourable Court to order and direct that he be put on his trial before a judge and jury.

And your petitioner as in duty bound will ever pray.

The following affidavit was filed in answer to the petition:

George Blackstone Williams, sworn, states:

1. That I am Assistant Resident Magistrate for the district of the Cape.

2. That on the 8th August, 1896, I was appointed to act as Assistant Resident Magistrate in charge of police, and that I acted in that capacity to the 19th September, 1896.

3. That I was not in my said capacity intimately acquainted with all the details of the prosecution against Jacob Mohr, and the nature of the evidence to support such prosecution, and that I was not myself bound to, and in fact did not, prepare the necessary evidence for the Crown, and I also state that I was not, previously to the hearing of the evidence in the Magistrate's Court, aware of the number of charges, nor of the particulars of the same, that were to be brought against the said Jacob Mohr.

8. That at the time the said Jacob Mohr was committed for trial he made the following statement in answer to the usual question: "I wish to say nothing." That it was not until after he had signed the said statement that he caused a letter to be handed to me requesting that he might be tried by a jury, which letter I caused to be handed back to him.

Upon this petition the Chief Justice made the following order:

The law empowers the Attorney-General to remit the case to the Resident Magistrate for trial. If the Resident Magistrate for any reason is incompetent to try the case, the prisoner is entitled, after verdict and sentence, to bring the case in review before the Supreme Court. In the present case the incompetency of Mr. Williams, A.R.M., has not been proved, in the absence of clear evidence, that he acted as prosecutor in the case against the prisoner before the case was remitted. No order.

On the 2nd October the prisoner's agent asked for another postponement, and handed in the following objections, which were disallowed.

Whereas the Honourable the Supreme Court has by an order in Chambers, dated the 29th day of September, 1896 (hereto attached), decided that under no circumstances can there exist any such thing as a right to British subjects to claim to be tried by a jury, and as such order is in the humble opinion of the accused *ultra vires*, and an abrogation of the privileges conferred upon all British subjects, both by Magna Charta and the Charter of Justice, and, whereas the accused intends to appeal to the Privy Council against such order of the Honourable the Supreme Court, he now moves to have further proceedings stayed in this Court pending an application to be made to the Honourable the Supreme Court for leave to appeal to Her Majesty's Privy Council, in order that it may be decided whether the right to be tried by a jury can be taken from an accused person, and that too without opportunity being afforded to make his application to a full Court, as was intended to be done by the motion set down for the 12th day of October, 1896. In the event of the foregoing application being refused, but not otherwise, the accused excepts to the jurisdiction of this Court to proceed with the trial of the case upon the following grounds *inter alia*: (*a*) That the whole matter is *sub judice* in a Court of Superior Jurisdiction; (*b*) that the accused is entitled to his discharge, inasmuch as after the Court (*qua* jury) had been charged with the prisoner and a plea of "not guilty" recorded (after accused had refused to plead), all proceedings subsequent to the hearing of this case on the 25th day of September, 1896, are illegal; (*c*) that, inasmuch as the whole case depends upon the evidence the Court places upon a certain statement produced by Sub-Inspector Easton, the validity of which will be denied by the accused, and inasmuch as during the progress of the preliminary examination, the officer now charged with the trial of this case was Acting Chief of the Police, or Assistent Resident Magistrate, charged with the control and discipline of the Cape Police—without in any way wishing to or intending to question the honour, integrity, or ability of such said officer—the accused objects to such said officer trying this case, inasmuch as he will be called upon to judge between the accused and an inferior officer of such police force, he, the said Chief of Police, being during part of the preliminary examination *ex-officio* prosecutor; (*d*) that the circumstance attending the preliminary examination held in this matter were such that it is impossible—however anxious and desirous he may be of doing so—for the officer who held the preliminary examination (or any such officer) to now try this case without a preconceived notion of the guilt of the accused, wherefore the accused will be greatly prejudiced in his defence; (*e*) that the whole proceedings are null and void on the grounds of irregularity and illegality.

The trial then proceeded, the prisoner being found guilty on the clearest evidence on the first four counts of the indictment, and sentenced to ten months' imprisonment with hard labour.

The following were the Magistrate's reasons: I did not think that either of Mr. Shaw's two first applications for postponement on the 25th September were based on reasonable grounds, the case having been legally remitted by the Attorney-General for trial by this Court, and I refused to stay proceedings on the 2nd October for the same reasons, and because I held that the whole matter was not *sub judice* in a Court of superior jurisdiction, and that there was nothing to prevent this Court from adjourning the case from time to time, as was done, for good reasons shown. With regard to the concluding paragraphs of Mr. Shaw's objection, I say that the preliminary examination was commenced by me before, and concluded by me during the period that I was in charge of the police. That I took no part whatever in the prosecution of the case, and that nothing took place at any time in connection with the police or otherwise to prejudice me in the matter, or to prevent me from dealing with the case impartially. With reference to prisoner's evidence, I say that all the charges were read to him before he was called upon to plead. On a careful consideration of the evidence, I was satisfied that prisoner was guilty on the first four counts, but I was not satisfied of his guilt on the fifth count.

The prisoner now appealed.

Mr. Graham for the appellant.

Mr. Sheil, Acting Attorney-General, for the Crown.

The Court dismissed the appeal.

The Chief Justice said: I understand now that this is an appeal on the merits of the case, and that the accused has practically abandoned the objection to the alleged irregularity in the proceedings at the trial. The irregularity is said to have consisted in Mr. Williams being both prosecutor and judge. Mr. Williams says: "I took no part whatever in the prosecution by the police, and nothing took place at any time in connection with that case to prejudice me in the matter, or prevent me from dealing with that case impartially." If this statement could have been contradicted, I have no doubt that counsel would have advised the accused to proceed, not by way of appeal but by way of review. It would have been a gross irregularity, and the Court would certainly have set aside the conviction if it had been proved that Mr. Williams was both prosecutor and judge. His statement now quite removes that objection, as there is nothing alleged in the prisoner's behalf to contradict the statement of Mr. Williams. The question is now reduced to one of credibility. The Attorney-General has very large powers under the Ordinance. A criminal prosecution is entirely in his hands, and he has full power to remit, except in certain cases, principally in those punishable by sentence of death. There was an application made to prevent that power being exercised. I could not accede to the application. I held that the law allows the Attorney-General to remit such cases to the magistrate, and I pointed out that if the magistrate was for any reason incompetent to try the case, the accused was entitled to bring the case up for review. In the present case the incompetency of Mr. Williams to try the case has not been proved. I am perfectly satisfied, after listening to the evidence read by Mr. Graham, that if that evidence had been heard by a jury, they would have had no hesitation in convicting the prisoner. No injustice has been done; the evidence is amply sufficient to justify the conviction; and the appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorney, D. Tennant, jun.]

MILNE v. ROBINSON. } 1896. Dec. 22nd.

Water—Prescription—Interdict.

Interdict granted restraining R. *from diverting or in any way interfering with water flowing from a spring on Crown land which* M. *alleged that he and his predecessors in title had exclusively used and enjoyed for a period of over thirty years.*

This was an application on the following notice of motion addressed to the respondent:

Take notice that application will be made to the Honourable the Supreme Court at Cape Town on Tuesday, the 22nd day of December, 1896, at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard on behalf of the applicant above named, at which time you are hereby required to show cause, if any, why you shall not be ordered to remove the pipe by which you have been conveying to the land occupied by you the water of a certain spring, whose waters the applicant and his predecessors in title have hitherto exclusively used and enjoyed, as also why you shall not be ordered to refrain from diverting the water of the said spring, or from interfering therewith, to the

prejudice of the applicant's legal rights; or why such other order shall not be made as to the said Court shall seem proper; also why you shall not be adjudged to pay the costs attending this application.

The following affidavits were filed in support of the application: I, George Leslie Hodgson Milne, the above-named applicant, do make oath and say:

1. I am a medical practitioner, and reside on the farm Nooitgedacht, in the division of Tulbagh.

2. I purchased the said farm, which measures 6 morgen 580 square roods, from one Dauw Lodewyk Malherbe, in the month of October last past, for the sum of £400, and am the registered owner thereof.

3. Since my purchase I have lived upon and cultivated the said farm.

4. For a long term of years, to wit, for a period of thirty years and upwards, the several successive owners of the said place have uninterruptedly and as of right used the entirety of the water of a certain spring for the purpose of irrigating the said farm.

5. The said spring is situated on Crown land to the south of the said farm, and the water therefrom has from time immemorial been conveyed to the said farm over Crown land by means of an open furrow.

6. A furrow conveys the water from the spring to a dam, from which, when a sufficient volume has gathered, the same is led out through a further piece of furrow to the said farm.

7. I have been reliably informed, and verily believe that the said furrow and dam were constructed by one of my predecessors in title.

8. The said farm absolutely depends upon the said water, and has enjoyed the exclusive use thereof from time immemorial up to the occurring of the grievances now to be narrated.

9. During the month of November last one Richard Hedley Robinson, who is living on a part of the property Zevenfontein, but who has no registered title to any part thereof, unlawfully inserted a pipe into the said spring, and by means thereof diverted all the water to the said part of Zevenfontein.

10. I protested against such action on the part of the said Richard Hedley Robinson, but without result, and when I attempted to remove the pipe I was assaulted by him and prevented from removing the pipe.

11. In laying the said pipe the said Richard Hedley Robinson was obliged to enter upon the said Crown land, and the pipe laid by him extends from the said spring over Crown land.

12. On the occasion referred to in paragraph 10 hereof, I felt myself so aggrieved that I prosecuted the said Richard Hedley Robinson for assault, and he was convicted and fined 5s.

13. Since the said conviction the said Richard Hedley Robinson has dared me to touch the said pipe, and has stated that he will again assault me if I venture to touch it. I am therefore compelled, the more so as I am in very poor health at the present, to refrain from forcibly removing the pipe.

14. I am being grievously injured by the want of the said water, and my plantations are suffering enormously in consequence; indeed, unless I get the water without delay I shall lose my whole vintage.

15. The said Richard Hedley Robinson has no claim or title to the said water, neither has the owner of Zevenfontein any claim thereto. Neither has either used it or interfered with it until now. It has throughout been solely used and enjoyed by myself and my predecessors in title.

16. Unless the said Richard Hedley Robinson be forthwith restrained from further infringing my legal rights and be forthwith compelled to remove the said pipe, I shall be irreparably injured.

I, James Levi Goss Ross, do make oath and say:

1. I am a police-constable, and reside at Tulbagh, in the district of Tulbagh.

2. I know the farm Nooitgedacht, situate in the Tulbagh district, now owned by the applicant.

3. I resided for some years and up to 1860, on the farm Zevenfontein, which is next to the above farm.

4. I remember at that time a coloured man lived on the said farm.

5. I remember that he cultivated the grounds and used the waters of a certain spring for irrigation purposes.

5. The said spring issues in the mountain south of the farm, and its waters are conveyed by an open furrow to the ground of the said farm.

7. This water has always to my certain knowledge been used by the respective owners of the ground for their plantations.

Notice of the application was not served upon the Government.

Mr. Schreiner, Q.C., was heard in support of the application.

The Chief Justice said: It is to be regretted that the respondent did not appear to explain his action in diverting the water, but on the face of the affidavits a *prima facie* case has been made out in favour of the applicant, who

alleges that he has been in possession of this water, with his predecessors, for thirty years. Respondent has now taken upon himself to remove the water. We will not order him to move the pipe, but will grant an interdict restraining respondent from diverting the water or in any way interfering with it to the detriment of the applicant, with leave to the respondent to apply to the Court for the removal of the interdict. The present order will be granted with costs.

[Applicant's Attorneys: Messrs. Walker & Jacobsohn.]

SMIT V. SMIT'S EXECUTRIX.

Mr. Graham applied to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent, to compel transfer to him of his half-share in the farm Stofkraal, in the district of Fraserburg, and acceptance of a kusting brief thereon for £400, to be converted and dealt with in terms of the will of applicant's late father.

Granted.

THE PETITION OF THE CONSISTORY OF THE DUTCH REFORMED CHURCH OF CAPE TOWN.

For extension of the return day of the rule *nisi* for authority to petitioners to transfer to the Huguenot Memorial Committee a certain portion of the land granted to the said Church in the years 1755 and 1861 for burial purposes, such land being no longer used as a graveyard.

Mr. Innes, Q.C., appeared for the applicants, and applied for postponement of the hearing until January 12.

Application granted.

IN THE INSOLVENT ESTATE OF WILLEM J. VAN WYK.

Mr. Graham appeared in support of the application by the trustee of the said insolvent estate for a further period of one year within which to file his account and plan of distribution, such time being necessary to enable him to realise the only asset—namely, the remaining extent of certain farms in the district of Calvinia.

A further period, until September 30, was granted.

TRUSTEE OF VAN WYK V. VAN WYK. } 1896. Dec. 22nd.

Insolvency — Mortgage — Lease — Crops — Rent paid in advance.

The owner of land, having mortgaged and thereafter leased it, became insolvent;

Held *that the trustee of his insolvent estate would be entitled either to denounce the lease in case the land, when offered for public sale subject to the lease, should not realise sufficient for the payment of the mortgage debt, or to institute an action to set aside the lease without first offering the land for sale subject to the lease, in case it had been entered into in fraud of the creditors but that, until the lease is so denounced or set aside, the lessee is entitled to reap the crops sown by him upon the land.*

This was the return day to a rule *nisi* granted by the Court on the 7th December, 1896.

[The facts of the case will be found fully reported under that date.]

Mr. Schreiner, Q.C., applied to make the rule absolute.

Mr. Searle, Q.C., for respondent, relied on *Albertyn* v. *Van der Westhuyzen* (5 Juta, 585). The lease is in existence. The proper course is either to bring action to set aside the lease under section 83, Insolvent Ordinance No. 6 of 1843, as being in fraud of creditors, or formally to put up the land for sale by public auction subject to the lease, and if it does not fetch enough then it can be put up without the lease. *Smith* v. *Smith* (Foord, 19). It is not the proper course to endeavour to obtain an order of this nature by motion.

Mr Schreiner: *De Beers Consolidated Mines* v. *London and South African Exploration Company* (3 Sheil, 443) justifies our action. The crops must go with the soil. The most that a *bona-fide* holder could claim would be the value of the seed. We could not put the land up for sale at public auction, as the respondent himself lodged a caveat. Moreover, a presumption of fraud has arisen, owing to the fact of this peculiar lease being drawn up within six months before the order of sequestration.

The Chief Justice: Yes, but if it is true there was a three years' lease before the present lease that would go far in establishing a presumption of *bona-fides*.

Mr. Schreiner: There is at least no right to the lessee in the crops until separation from the soil. We will suffer an irreparable injury if the rule is not made absolute.

De Villiers, C.J.: The rule was granted with considerable reluctance, and with full warning that the applicant took it at his own risk. His affidavit disclosed some proof of *mala fides* on the part of the insolvent and respondents in the lease to the latter of the land for six years at so

low a rental as £20 a year. It now appears that before the lease was executed the land had been let to the respondents for three years at the same rental, and that, in addition to the payment of £20 a year, the respondents have virtually to support the insolvent and his minor children. Such, at least, is the respondent's statement, which, until it is refuted by the applicant in the action which he intends to institute, must be taken to be correct. If he succeeds in proving that the lease was a fraud upon the creditors he will, of course, be entitled to have the lease set aside without first offering it for sale subject to the lease. He would even be entitled to denounce the lease without first bringing an action, but only in case the highe t price offered for the land subject to the lease is insufficient to pay the mortgage debt. Until the lease is so denounced by the trustee, or set aside by the Court, the respondents, as lessees, are entitled to reap the crops sown by them. The only circumstance which lends some support to to the charge of fraud is the statement of the respondents that they have paid two years' rent in advance, but it is quite possible that this may be true, and that the rent may have been so paid without any intention to defraud. Such a payment in advance would not be allowed to prejudice the rights of a person purchasing the land after the date of the lease. The rule that "hire goes before sale" is subject to some qualifications, the most important being that the lessee is liable to the purchaser for the rent accruing after transfer to the purchaser, even although such rent may have been paid in advance to the lessor (see *Voet*, 19, 2, 19). The Court has now to deal with a mortgage executed before a lease, and not with a sale effected after a lease of the land. The lease has neither been denounced by the trustee, nor set aside by the judgment of a competent Court. Following the decision in *Albertyn* v. *Van der Westhuysen* (5 Juta, 385), I am of opinion that the mortgagor is not entitled to claim the standing crops, and the rule must therefore be discharged with costs, with leave to the applicant to insert in any action he may be advised to institute a claim for the recovery of any costs paid by him in respect of the present application.

[Applicant's Attorney: S. J. Mostert; Respondent's Attorney: V. A. van der Byl.]

APPENDIX.

*BARRINGTON'S EXECUTOR v. COLONIAL GOVERNMENT. 1895. Oct. 10th.

Grant—Prescription.

H., *in an action for a declaration of rights, claimed certain Crown land, his claim being based partly on grant and partly on prescription.*

Held (1) *that the land was not included in the grant, and* (2) *that, as to the claim by prescription, the mere fact that the plaintiff and others had pastured their cattle for thirty years and upwards on the land in dispute, the Government offering no opposition, was not sufficient to establish a prescriptive right, as against the Crown, to the ownership of the land.*

Action by J. W. Barrington (in his capacity as executor of his father, the late Hon. H. F. F A. Barrington) against the Hon. John Frost, C.M.G., in his capacity as Secretary for Agriculture, and as such representing the Colonial Government. The declaration alleged that in 1850 the farm Lawnwood, in the district of Knysna, was granted to the late Hon. H. F. F. A. Barrington, who died in March, 1882.

The plaintiff annexed a plan of Lawnwood to the declaration, and alleged that the true northern boundary was the line *b c* on the said plan, and that the Government wrongly contended that *b c* was the true boundary.

The declaration further alleged that for over thirty years the plaintiff and his father had occupied as of right the land up to *b c*.

The prayer was that *b c* might be declared the boundary of Lawnwood.

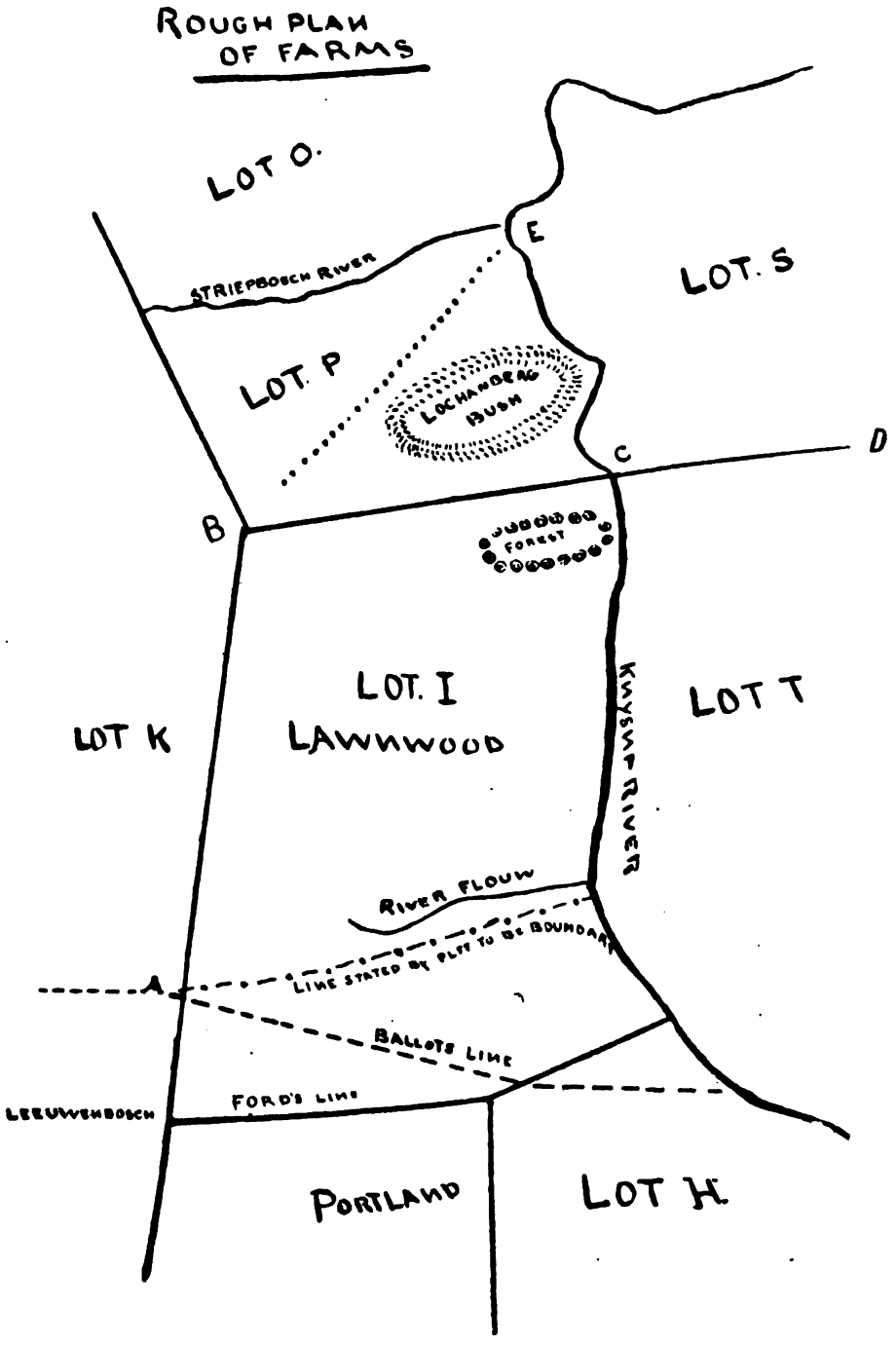
The plea alleged that *b c* was the true boundary, and denied the prescriptive user, and claimed in reconvention that the line *b c* should be declared the true boundary.

To the plea was annexed a copy of the original grant and diagram of Lawnwood,

*I am indebted to Mr. Justice Watermeyer, High Court, Matabeleland, for the report of this case which was heard at the Knysna Circuit Court, before Upington J., on the 10th October, 1895.

The delay in publishing the report was occasioned by the loss of my MS.

J.D.S.


ROUGH PLAN OF FARMS
LOT O.
STRIEPBOSCH RIVER
E
LOT. S
LOT. P
LOCHANDERG BUSH
C
D
B
FOREST
LOT K
LOT. I
LAWNWOOD
KWYSMP RIVER
LOT T
RIVER FLOUW
LINE STATED BY PLFF TO BE BOUNDARY
A
BALLOTS LINE
FORD'S LINE
LEEUWENBOSCH
PORTLAND
LOT H.

and also an extract from a general plan of Crown lands, framed by Surveyor Ford in 1848.

In the original grant the farm is described as "Lot 1,148, marked on the general plan Lot I . . . . . now called 'Lawnwood' . . . . measuring 1,472 morgen . . . . bounded N. by lot P, N.W. by lot K. S. by W. by the farm Portland, S. by lot H, and E. by lot T . . . as will further appear from the diagram framed by the surveyor."

The diagram attached to the grant gave the extent and boundaries as above, and added the words: "Taken from a general plan framed by Mr. Land Surveyor Ford."

The extract from the general plan showed the surrounding lots as laid out by Ford.

Mr. Searle, Q.C., and Mr. Jones appeared for the plaintiff.

Mr. Watermeyer and Mr. Tredgold for the Government.

The evidence showed that the farm Lawnwood was a steep mountain side, largely covered with forest. Portland Height (point *b* on the plan) was the highest point of the mountain, and the land sloped steeply from *b* to *a*, and also in the direction of the river.

a had been fixed in 1886 (*Barrington and Others* v. *Colonial Government*, 4 Juta, 408) as the beacon of Leeuwenbosch, and had ever since been treated as a common beacon of Leeuwenbosch, Portland, and Lawnwood.

The Lawnwood forest came nearly, but not quite up to the line *b. c.*

The lines *b c* and *b e* each ran along ridges bare of forest, one running nearly due east, the other nearly north-east. Between the two ridges was a strip of forest known as the Lochanberg Bush. The rest of the triangle, *c b e*, was pasture land, bare of forest.

At *e* was a ford, known as the Old Drift, and a path led to it from *b*.

From the ridge *b e*, the land sloped steeply down to a river, known as the Streepbosch, which flowed into the Knysna River just above the Old Drift. On the opposite side of the Knysna River, and directly in the line *b c*, produced, was a prominent hill, known as Keurkop (point *d* on the plan.) There was a beacon at *b* but none at either *c* or *e*.

The plaintiff's witnesses said that no beacon had existed at *d* before Mr. Fourcade placed one there in 1884, but Fourcade stated that he had found what he believed to be the remains of an old beacon there.

There was no fencing or cultivation north of the Lawnwood forest, and no timber had ever been worked in the Lochanberg bush.

Lawnwood and Portland had been held by one owner, and occupied as one farm since 1850, but some evidence was led to show that before 1850 a line from *a* to a point near the junction of the Flouw River with the Knysna River had been treated as the northern boundary of Portland.

It was proved that for a long period, commencing shortly after the grant of Lawnwood, the late Mr. Barrington and the present plaintiff had pastured cattle over the land in dispute. It was also proved that on two occasions strange cattle pasturing on this land had been seized by Mr. Barrington or his servants, and removed to Portland, and released on payment by the owners.

On the other hand, several witnesses proved that this land had been treated as common pasture land, and that they had pastured their cattle there without let or hindrance. The plaintiff stated that he was never aware of this. The Conservator of Forests stated that his department never objected to cattle being pastured on Crown lands. Evidence was tendered that the late Mr. Barrington had pointed out to his servants the line *b e* as the boundary, but but this was objected to and disallowed. Witnesses stated that they had seen the surveyor Ford placing flags along the line *b e* in 1848. On the diagram attached to the grant of Lawnwood two strips or horns of forest are shown in the north-east corner above the main Lawnwood forest, and the plaintiff stated that these must be meant for the Lochanberg Bush, and that there was no other bush which they could represent. But other witnesses stated that there were two wooded creeks between the line *b c* and the main forest, and also that the sketching on the diagram did not resemble the shape of the Lochanberg Bush.

For the defence, the general plan of the Crown lands framed in 1848 by Surveyor Ford was tendered.

Mr. Searle, Q.C., objected, and quoted *Barrington and Others* v. *The Colonial Government* (4 Juta, 408). The Court ruled that the cases were different, inasmuch as the grant and diagram of Lawnwood made direct reference to Ford's general plan, and that the said plan was therefore necessary for the proper interpretation of the grant and diagram.

Ford's plan put in.

A letter from the late Mr. Barrington to the Colonial Secretary written in February, 1849, was put in. In this letter Mr. Barrington stated that he had seen Ford's general plan and complained that lots H and I were encroachments on his farm Portland.

The Colonial Secretary replied, admitting that lot H was an encroachment on Portland, and abandoning the whole of that lot, but making no admission as to lot I. In December, 1849, Mr. Barrington wrote inquiring as to the nature of lot I.

The Surveyor-General replied that lot I was half forest and half pasture land.

In 1850, Mr. Barrington, through his agent Frere, purchased lot I (Lawnwood) after some correspondence as to the extent of the lot. In the last of the letters Frere writes that his principal "is willing to accept lot I as consisting of 1,472 morgen."

The grant was dated May, 1850.

Mr. Fourcade, Government land surveyor, stated that he had been in the Forest Department, and employed in the Knysna forests since 1883. That he had surveyed the Crown lands to east, north, and west of Lawnwood for the purposes of forest demarcation. That his survey agreed with Ford's in angles and distances; that if *b c* be taken as the northern boundary of Lawnwood it would agree exactly with Ford's survey; that a point on Ford's plan in the northern boundary of Lawnwood (produced) represented Keurkop, and could represent no other point; that to take *b e* as the northern boundary would alter Ford's angle by nearly 40 degrees, and would throw out the whole of his survey, and make it impossible to locate the lots laid out by him to the north and east of Lawnwood; that an unnamed river on Ford's plan marked by him as the boundary between lots P and O, and nearly parallel on his plan to the northern boundary of Lawnwood must have been meant for the Streepbosch River, and that there was no other river which it could have been meant to represent.

The witness further stated that the result of his own surveys showed Ford to have been a very accurate surveyor.

The witness had not surveyed the boundary between Lawnwood and Portland.

It further appeared that Ford had placed the south-west corner of Lawnwood in the line *b a* (produced), but further south than *a*.

It appeared that if *b c* were taken as the northern boundary, and Ford's southern boundary of Lawnwood were taken as correct, the extent given in the grant would be approximately correct if a line surveyed by Surveyor Ballot in 1886 (but not admitted by plaintiff to be correct) were taken the farm would contain 1,467 morgen, but if plaintiff's contention were correct that the true southern boundary was a line from *a* to near the mouth of the Flouw River the farm would contain only 1,100 morgen.

The triangle in dispute (*c b e*) contained about 370 morgen. Either Ford's or Ballot's southern line with *b c* as the northern boundary would make the farm half pasture land, but taking the southern boundary contended for by plaintiff there would not be half pasture unless *b c e* were included. The original grant and diagram of Portland, dated 1818, were put in by the plaintiff.

The grant described Portland as bounded N. by Government forest, on the west contiguous to Leeuwenbosch, on the east contiguous to the Knysna River.

The diagram, which was very roughly drawn, did not give an extent equal to what was now claimed to be Portland.

The first dispute between the parties occurred in 1887, when Fourcade stated to Barrington that the Lochanberg Bush belonged to the Government, and that he should if occasion arose issue licences to work in that bush. A Government licence for Lochanberg was issued in that year, and the plaintiff as soon as he heard of it demanded the licence money from the Government. The Conservator of Forests refused to recognise plaintiff's claim, and several letters passed in which each side maintained his claim to the ownership of the triangle *c b e*.

In 1894 Fourcade published his demarcation plan of Crown Forests, and showed the disputed triangle as Government land. Plaintiff objected to the plan, and being threatened with proceedings under the Lands Beacons Act he instituted this action.

Mr. Searle, Q.C.: The admission of the Government in 1849 as to lot H, and the decision in 1886 (*Barrington and Others* v. *Colonial Government*, 4 Juta, 408), as to the position of the beacon *a* showed that Ford had wrongly placed Portland. Thus a doubt was thrown on the accuracy of the rest of his survey.

Barrington bought a definite amount of land (1,472 morgen). Unless the triangle *c b e* were included he would not obtain that amount. The Government's contention did not give half pasture land.

The flags placed along *b e* showed that Ford intended that to be the line.

The grazing and seizing of stray cattle were sufficient acts of ownership to constitute prescription.

The other grazing sworn to was without Barrington's knowledge.

Mr. Watermeyer was not called upon.

Upington, J., in giving judgment, said: The plaintiff bases his claim to the land in dispute on two grounds: (*a*) Grant from the Government; (*b*) Prescription.

Dealing first with the question of prescription, I wish to repeat what I said in the case of

Blanckenberg v. *The Colonial Government.* There are cases in which one man can acquire a title to another's land by prescription, but in my opinion the evidence in such cases should be of the strongest kind, and especially should this be so in claims against the Government. Government land is too often treated as a sort of no man's land.

In *Blanckenberg's case* (11 Juta, 90), but for the admission of the Government, I would have had serious doubts as to whether the plaintiff was entitled to succeed. In the present case all that the plaintiff could say was, that he had pastured his cattle on the land in dispute. But the evidence showed that other persons had done the same, and if Mr. Barrington succeeded on this ground it would be only because he was first in the field. No other proprietary rights had been exercised. The evidence altogether was too meagre to establish a title by prescription. On the other ground also I am of opinion that the plaintiff's claim has not been made out.

(His lordship referred to the diagrams and grants, and the correspondence between the late Mr. Barrington and the Government at the time of the grant, reviewed at length the evidence of Mr. Fourcade, and continued:)

The evidence of the grants and diagrams is very clear. In the present case the northern line alone was to be dealt with, and nothing in this judgment will prejudice plaintiff's rights in regard to the southern boundary of Lawnwood. To adopt plaintiff's contention as to the northern boundary would have the effect of throwing out the whole of Ford's plan, and practically doing away with lot P. Where the diagram agreed so exactly with the general plan, I can only come to one conclusion, and declare the line from Portland Height in the direction of Keurkop to be the northern boundary of Lawnwood.

Judgment: On the claim in convention, absolution from the instance.

On the claim in reconvention, judgment for plaintiff in reconvention with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Reid & Nephew.]

SIGCAU V. THE QUEEN. { 1897. Feb. 26th.

The following is the judgment of the Privy Council affirming the judgment of the Supreme Court; *vide Sigcau* v. *The Queen* (5 Sheil, 268):

Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal the Honourable Sir John Gordon Sprigg, in his capacity as Prime Minister of the Colony of the Cape of Good Hope, v. Sigcau, from the Supreme Court of the Colony of the Cape of Good Hope; delivered 26th February, 1897.

[Present: The Lord CHANCELLOR, Lord WATSON, Lord HOBHOUSE, Lord MACNAGHTEN, Lord SHAND, Lord DAVEY, and Sir RICHARD COUCH.]

[Delivered by Lord Watson.]

The respondent Sigcau was at one time an independent native chief, exercising paramount authority within the district of country in South Africa known as Pondoland. In the beginning of the year 1894 he made a peaceful cession of his territory to the British Crown, and became one of Her Majesty's subjects. Thereafter, Her Majesty's representative in the Government of the Cape Colony appointed officers for the administration of the ceded territory, and duly proclaimed certain laws to be in force within it. One of these laws was the Colonial Act No. 24 of 1886, which contains a complete criminal code. It specifies in detail numerous offences against public order, public tranquillity, and the administration of justice, and provides for their adequate punishment. By section 112 any wilful attempt to obstruct the course of justice or the administration of the law is made punishable with death or with imprisonment for life. The twentieth chapter of the Act provides a complete system of procedure for the arrest, trial, and condemnation of offenders, and confers criminal jurisdiction upon certain local Courts; and by section 268 power is reserved to the Attorney-General to remove any case for trial in the Supreme Court of the Cape Colony, if it shall appear to him that by that course substantial justice may be better attained.

On the 14th August, 1894, an Act of the Cape Legislature was assented to by the Governor of the Colony on behalf of the Crown, which proceeds upon the preamble that it was the intention of Her Majesty to issue Her Royal Letters Patent to authorise the Governor, by Proclamation under his hand and the public seal of the Colony, to declare that from and after a day to be therein mentioned the country known as Pondoland, comprising the territories of East and West Pondoland, should be annexed to and form part of the Colony, in case the Legislature of the Colony should have passed an Act providing that the said country should become a part of the Colony. Section 1 of the Act provides that from and after such day as the Governor shall, pursuant to the powers in that behalf contained in any Royal Letters Patent which may be issued for that purpose, declare by proclamation the country mentioned in the

preamble, and with the name of Pondoland, shall be annexed to and form part of the Cape Colony.

Section 2, which it is necessary to construe for the purposes of this appeal, enacts that from and after the date of such proclamation the territory of East Pondoland shall become part of that portion of the Colony known as Griqualand East, and the territory of West Pondoland, part of that portion of the Colony known as Tembuland; "and the said territories shall be subject to such laws, statutes, and ordinances as have already been proclaimed by the High Commissioner, and such as, after annexation to the Colony, the Governor shall from time to time by proclamation declare to be in force in such territories: Provided always that all such laws made under or by virtue of this Act shall be laid before both Houses of Parliament within fourteen days after the beginning of the session of Parliament next after the proclamation thereof as aforesaid, and shall be effectual, unless in so far as the same shall be repealed, altered, or varied by Act of Parliament." The contemplated annexation was thereafter duly carried into effect, and the provisions of the Act became operative.

On the 11th June, 1895, Sir Hercules Robinson (now Lord Rosmead), as Governor and Commander-in-Chief of the Cape Colony, and as Her Majesty's High Commissioner, &c., &c., issued the Proclamation which has given rise to these proceedings. It commences with the narrative that it had been reported that the respondent Sigcau, the Chief of the tribes residing in the territory of East Pondoland, had refused to permit a duly authorised officer of the Government to do his lawful duty; that it appeared that the presence of the said Sigcau in East Pondoland was dangerous to public safety and good order in that country, and was likely to lead to the disturbance of the public peace; and that it appeared expedient to make provision for the arrest of the said Sigcau, and for his detention in some suitable place either within or beyond the boundaries of Pondoland, but within the territories of the Transkei, Tembuland, and Griqualand East. The operative part of the Proclamation is in these terms:

"Now, therefore, under and in virtue of the powers vested in me by law, more especially in the Acts annexing the territories of the Transkei, Tembuland, Griqualand East, and Pondoland, I, the said Governor aforesaid, do proclaim, declare, and make known that the said Sigcau has by his acts, in disregard and defiance of the law, rendered himself liable to arrest; and I do hereby authorise and command the Chief Magistrate of Griqualand East to cause the said Sigcau, on failure to surrender himself, to be forthwith arrested; and do ratify and confirm all acts done or authorised, or to be done or authorised by the said Chief Magistrate, or done with his approval by any officer of the law proper for the execution of criminal warrants, any member of the force of Cape Mounted Riflemen, any constable, police officer, or gaoler, in or about the arrest of the said Sigcau, or with a view to securing his person, or in encountering, opposing, or suppressing any resistance by or on behalf of the said Sigcau, and his subsequent arrest and custody under this Proclamation. And I do authorise and empower the said Chief Magistrate, or any other person acting in accordance with my instructions, to detain the said Sigcau in such place in the aforesaid territories as may be by me from time to time determined, during such time and under such conditions as to safe custody as may appear to me to be necessary and expedient for the preservation of public order and safety: Provided that it shall be lawful, after such inquiry as may be instituted by my direction, and in case it may be possible to do so without jeopardy to the interests of public peace and order, to release the said Sigcau from close custody in detention, and to appoint a place within the said territories for the residence of the said Sigcau, with the pecuniary allowances to which he is entitled, but under such terms and conditions as may be determined by further proclamation."

After the terms of the foregoing Proclamation came to his knowledge, Sigcau went to Kokstad, and on the 18th June, 1895, reported himself to the Chief Magistrate, by whom he was at once placed in prison and kept in close confinement. No warrant was issued for his arrest, other than the Proclamation; beyond the vague allegations contained in that document, no charge was preferred against him; and he was not brought before any tribunal, in order to his being dealt with according to the ordinary course of law.

On the 29th July, 1895, a petition was presented, on behalf of the respondent, to His Honour the Chief Justice and others the judges of the Supreme Court of the Cape Colony, praying them to "order his immediate liberation and discharge; or otherwise that your lordships will call upon the Magistrate of Kokstad aforesaid under whose custody your petitioner understands he is, to produce your petitioner before your lordships, and to show cause why he should not be discharged; or may make such other order in the premises as to your lordships may seem meet." The petition was opposed by the Right Hon. Cecil John Rhodes, at that time Prime Minister and Secretary for Native Affairs of the Colony of the Cape of Good Hope, and by the

Hon. William Philip Schreiner, Q.C., the Attorney-General of the Colony. The case was heard before the Supreme Court, when it was maintained by the Attorney-General that the Proclamation of the 11th June was a special law, which the Governor had full power to enact, under the provisions of section 2 of the Pondoland Annexation Act, 1894, which have already been cited at length, and that the Court had therefore no jurisdiction to interfere with its execution. Chief Justice de Villiers delivered the opinion of the Court, who ordered "that the said applicant be forthwith discharged from custody."

Mr. Rhodes and Mr. Attorney-General Schreiner applied to the Supreme Court for leave to appeal to Her Majesty in Council, which was refused, upon the ground that such leave can only be granted by them in civil suits or actions, in which the sum or matter at issue exceeds £500. On the 12th December, 1895, Her Majesty, upon the advice of this Board, granted leave to appeal, subject to the condition that the appellant should in any event pay the costs as between solicitor and client incurred by the respondent in defending the appeal Mr. Rhodes and Mr. Schreiner having ceased to hold office in the Cape Government, the Supreme Court of the Colony, on 21st April, 1896, substituted the new Premier of the Colony, Sir John Gordon Sprigg, as appellant, in room of his predecessor, omitting the new Attorney-General, the Hon. Sir Thomas Upington, who had previously been a member of the Supreme Court, and was a party to the judgment under appeal.

The Proclamation in question is described in the appellant's case as an act of State, which is beyond the cognizance of any judicial tribunal. Whatever may have been meant by that expression, the character of the document is, on the face of it, abundantly clear. It is an edict, dealing with matters administrative, judicial, legislative, and executive, in terms which are beyond the competency of any authority except an irresponsible sovereign, or a supreme and unfettered legislature, or some person or body to whom their functions have been lawfully delegated. If the Governor and High Commissioner of the Cape Colony could be shown to have occupied one or other of these positions, a Court of law would be compelled, however unwillingly, to respect his Proclamation. If he did not, then his dictatorial edict was simply an invasion of the individual rights and liberty of a British subject. It set aside the established law of Pondoland with respect to arrest, trial, conviction, and punishment; and condemned the respondent Sigcau, untried and unheard, to imprisonment, the place and duration of his captivity being left to the uncontrolled will of the framer of the edict.

It was satisfactory to find that the appellant's counsel did not, in the argument before this Board, venture to trace the power of the Governor to enact such a proclamation to any authority directly derived from Her Majesty; because autocratic legislation of that kind in a colony having a settled system of criminal law and criminal tribunals would be little calculated to enhance the repute of British justice. Various Acts of the Cape Parliament, annexing different tracts of country to the Colony, were referred to in the course of their argument; but none of these had a direct bearing upon the question raised in this appeal, save the Pondoland Annexation Act, 1894, which is the only statute professing to confer legislative power upon the Governor within the territory of Pondoland. Whether His Excellency had, or had not, power to enact the Proclamation of 11th June, 1895, is therefore a question depending, in the first instance, upon the due construction of the provisions of the Act of 1894.

The general scheme of all these Acts appears to have been to delay the enactment of many salutary laws elsewhere prevailing throughout the Colony, until the native inhabitants of the newly-annexed territories had so far advanced in civilisation and in social progress as to make the gradual introduction of these laws advisable. Thus the new laws which were in future to be made by the Governor under the provisions of the Tembuland Annexation Act were to be (section 2) "new laws applicable to the said territories," an expression which obviously refers to general laws applying to all inhabitants of the territory, whether natives or not, and does not seem to contemplate or include special legislation directed against an individual inhabitant, and that in derogation of the rights conferred upon him by the general law of the Colony.

The legislative authority delegated to the Governor by the Pondoland Annexation Act is very cautiously expressed, and is very limited in its scope. There is not a word in the Act to suggest that it was intended to make the Governor a Dictator, or even to clothe him with the full legislative powers of the Cape Parliament. His only authority, after the date of the Act, is to add to the laws, statutes, and ordinances which had already been proclaimed and were in force at its date, such laws, statutes, and ordinances as he "shall from time to time by Proclamation declare to be in force in such territories." In the opinion of their lordships, these words do not import any power in the

Governor to make "new laws," in the widest sense of that term; they do no more than authorise him to transplant to the new territories, and enact there laws, statutes, and ordinances which already exist, and are operative in other parts of the Colony. It was argued for the appellant that the expression "all such laws made," occurring in the proviso, indicates authority to make new laws which are not elsewhere in force; but these words cannot control the plain meaning of the enactment upon which they are a proviso; and, besides, that enactment is left to explain the meaning of the proviso by the reference back which is implied in the word "such."

Their lordships think it sufficient for the disposal of this appeal to point out that the Proclamation of which the respondent Sigcau complains exceeds any delegated authority which was possessed by the Governor in two particulars which constitute its leading features. It is a new and exceptional piece of legislation, differing entirely in character from any of the laws, statutes, and ordinances which he is authorised to proclaim; and it in substance repeals the whole provisions of the existing law, with respect to criminal proceedings, in so far as the respondent is concerned. Upon these grounds, their lordships are of opinion that the issue of the Proclamation was an illegal and unwarrantable Act, and that the Supreme Court of the Colony did right in refusing to give effect to it, and in liberating the respondent.

On the assumption that the Pondoland Annexation Act did, as the appellant maintains, confer upon the Governor either expressly, or by plain and reasonable implication, the arbitrary powers which would be required in order to justify his Proclamation, a variety of important questions would arise; but upon these, in the view of the case which they have taken, their lordships find it unnecessary to express any opinion.

Their lordships will therefore humbly advise Her Majesty to affirm the order of the Supreme Court appealed from, and to dismiss the appeal. The appellant must pay to the respondent his costs of the appeal as between solicitor and client.

DIGEST OF CASES.

PAGE

Abduction — Man-stealing — Child-stealing—Criminal Offence—Indictment —*Plagium.*

The wrongful and unlawful taking away from her father's custody of a minor child does not constitute the offence of abduction *unless committed with the view to marriage or from motives of lust.*

Man-stealing *is a punishable offence and consists in the wrongful and unlawful carrying away or concealing of a human being with a view to depriving him of his liberty.*

If the offence is committed on a child it is properly described in the indictment as child-stealing.

R. v. Matati 175

R. v. Buchenroeder 175

Absence (long) from Colony, *see* Executor Testamentary.

Acceptor's Negligence, *see* Provisional.

Accomplice, *see* Game Offence.

2. ——*see* Evidence.

Account, *see* Theft.

2. ——(Particular), *see* Insurance.

Acknowledgment of Debt, *see* Provisional Sentence.

Act Committed outside Colony, *see* Appeal.

Act 20 of 1856, section 8, *see* Jurisdiction.

2. —— ——section 10, *see* Jurisdiction.

3. —— ——section 42, *see* Resident Magistrate's jurisdiction.

4. ——4 of 1861, section 8, *see* Party to suit.

5. ——3 of 1861, section 7, *see* Registration.

6. ——3 of 1864, schedule 17, *see* Bank.

7. ——18 of 1873, section 4, *see* Appeal.

8. ——21 of 1876, section 4, *see* Appeal.

9. ——39 of 1877, section 29, *see* Insolvency.

PAGE

10. ——28 of 1881, *see* Derelict lands.

11. ——22 of 1882, *see* Extradition.

12. ——45 of 1882, section 49, *see* Municipal Council.

13. —— ——Act 5 of 1895—Election of Councillors — Qualifications for Nomination.

Lawton v. Sea Point Municipality... 236

14. ——28 of 1883, section 73, *see* Liquor licence.

15. ——30 of 1883, section 7, *see* Fencing.

16. — 5 of 1884, section 19, subsection 12, *see* Will.

17. —— ——section 18, *see* Transfer duty.

18. ——38 of 1884, *see* Insolvency.

19. —— ——section 17, *see* Insolvency.

20. ——43 of 1885, section 8, *see* Magistrate's Court.

21. ——36 of 1886, section 5, *see* Game offence.

22. ——23 of 1889, *see* Interdict.

23. ——33 of 1889, sections 3 and 4, *see* Resident Magistrate's Jurisdiction.

24. ——25 of 1891, section 21, *see* Liquor licence.

25. ——34 of 1891, section 60, *see* Doctor.

26. ——15 of 1892, section 72, *see* Appeal.

27. ——27 of 1893, section 12, *see* Animals' diseases.

28. —— ——section 12—Proclamation 134 of 1896.

Schroeder v. Colonial Government... 235

29. ——35 of 1893, *see* Theft of Stock.

30. ——5 of 1895, *see* Act 45 of 1882.

31. ——10 of 1896, *see* Transfer duty.

32. ——36 of 1896, *see* Interdict.

Acting Chief of Police, *see* Trial by jury.

PAGE

Actio calumniæ, *see* Malicious prosecution.

2. ——*injuriarum*, *see* Malicious prosecution.

3. ——*redhibitoria*, *see* Sale and purchase.

Action against substituted debtor, *see* Bailment.

Administrators, *see* Executors.

Admission of injury, *see* Interdict.

Adultery, *see* Divorce.

Advertisement, *see* Sale.

Affidavit, *see* Barrister.

Agency, Alleged, *see* Damages.

Agent, *see* Delivery.

2. ——Enrolled, *see* Construction.

3. ——*see* Magistrate's Court.

4. ——*see* Theft.

Alienation (Mala-fide), *see* Insolvency.

2. ——Prohibition of, *see* Donation.

3. ——Restraint on, *see* Will.

4. ——*see* Trust property.

Alterations by lessee, *see* Lease.

Ambiguity, *see* Provisional Sentence.

Animals' diseases—Rinderpest—Act 27 of 1893, section 12—Proclamation 154 of 1896—Spread of contagion—Dogs.

H., *with four pointer dogs, crossed the Vaal River from Kimberley into Barkly West at a time when there were no restrictions on the passage of animals.*

Before his return the Colonial Government issued a proclamation in terms of section 12, Act 27 of 1893, prohibiting animals (including dogs) from being brought across the Vaal River.

The pointer dogs were accordingly detained by the Government Officials and H. *had to incur special expense for their maintenance and care.*

On an application to compel the Government to release the dogs on the ground that the proclamation was ultra vires *the Government,*

The Court held *that in view of the definition of "animal" in section 1 of Act 27 of 1893 the proclamation was* ultra vires *so far as regards dogs and ordered the release of applicant's dogs from detention.*

Hill v. Colonial Government ... 250

Ante-nuptial contract—Trustees—Release—Substitution.

G. *and* C. *were appointed trustees under the ante-nuptial contract of* B. *and* D. *After the death of* C. *the Court released* G. *from his trust on his applying therefor by reason of his absence from the Colony, old age, and physical infirmities.*

Day & Borsley, ante-nuptial contract 149

Appeal—Act 21 of 1876, section 4—Gross irregularity in proceedings—Indictment—Joint offence—Misjoinder—Master and servant—Act 18 of 1873, section 4—Desertion from service.

M. *and 44 others were charged on an indictment with desertion from the service of their employer* R. *at the Table Bay Docks.*

It was proved in evidence before the Resident Magistrate that the prisoners had left the service together and at sunrise had gone on board the steamer which was to take them to E., *and on which they were discovered all together in the hold.*

On appeal *(upon the ground of gross irregularity in the proceedings) from the conviction of the Resident Magistrate,*

Held that *as the prisoners had all left the service together, and were subsequently found and arrested together, and as the prisoners had suffered no special prejudice in all being joined in one indictment, and no objection having been taken in the Court below, the joinder in one indictment was not*

PAGE

such a gross irregularity in the proceedings as to justify the conviction being quashed.

Queen v. Mteto 248

2. ——Attachment to found jurisdiction — Rule *nisi*—Interlocutory order—Interdict—Insolvency—Act committed outside Colony—Peregrinus—Residence in Colony—Immovables in Colony—Ordinance 6 of 1843, section 4.

M., *a foreigner domiciled in the Orange Free State, applied to the High Court of Griqualand West for an order for attachment of a certain farm in the Colony to found jurisdiction in proceedings for the sequestration of the estate of* P., *who was also domiciled in the Orange Free State.*

The claim against P. *arose on a contract made and to be performed in the Orange Free State.*

The High Court refused to grant the provisional order of sequestration but issued a rule nisi *(to operate as interim interdict in restraint of alienation of the farm) "pending further proceedings for the recovery of the debt alleged to be due . . . or for the sequestration of the respondent's estate or otherwise."*

G. *had (prior to the rule being granted) bought the farm from* P. *though he had not received transfer. It was alleged that the farm was sold at a sum considerably under its value, but it was on affidavit that* P. *had been sued by other creditors in the Colony.*

Under all the circumstances the High Court discharged the rule on the return day.

On appeal, *the Court held that there being no appeal in case of an application for attachment, and it not being proved that there had been any act of insolvency committed in the Colony, the appeal must be dismissed.*

Michaelis v. Pretorius 279

PAGE

3. ——Roads—bad repair — Divisional Council liability.

Willowmore D. C. v. Des Vages ... 209

4. ——*see* Bill of Lading.

5. ——Cross appeal — Notice — Procedure.

Hanekom v. Haworth 262

6. ——Illegal Impounding—Act 15 of 1892, section 72 — Civil injury — Criminal proceedings — Resident Magistrate's sentence—Act 21 of 1876, section 4—Review—Rule 190 —Gross irregularity—Practice.

H. *was charged before the Resident Magistrate with contravening section 72 of Act 15 of 1892 and was found guilty. He allowed the time to elapse within which an appeal must be made. On application by* H. *to the Supreme Court for an order declaring that an appeal lay from the decision of the Magistrate as in a civil suit — or otherwise for leave to bring the proceedings in review under rule 190 :*

The Court held (1) *That though proceedings under section 72, Act 15 of 1892, should be treated as a civil matter, the proceedings before the Resident Magistrate were as a fact brought in a criminal form, and that the applicant therefore not having appealed in the time prescribed by section 4, Act 21 of 1876, for criminal cases, had lost his right of appeal.*

(2) *That though the proceedings were irregular yet, as apparently the judgment would have had to be much the same whether the proceedings had been taken in a civil or criminal form, there had not been such gross irregularity, nor was there such prejudice to the applicant, as to entitle applicant to the benefit of the rule.*

Haworth v. Resident Magistrate, Kenhardt 378

7. ——Jurisdiction — Summons —Mistake—Wrong party—Withdrawal —Witness expenses—Costs—Procedure.

PAGE

A summons was served upon T. *by mistake owing to a similarity of names, but* T., *who knew for whom it was meant, took no steps to secure the right person getting it.*

T. *came from the country (bringing his child to be christened) and attended at the Resident Magistrate's Court in consequence of the summons. The summons however had been withdrawn before the case came into court.*

T.'s *attorney afterwards applied for witness expenses, which the Resident Magistrate refused on the ground that there was a want of* bona-fides *by* T. *in his action in the matter, and that he had come into town to get his child christened and had taken advantage of the mistake.*

Held on appeal *that the application to the Magistrate was irregular, and that there was nothing before the Supreme Court on which it could adjudicate.*

Terblanche v. Oudtshoorn Municipality 304

8. ——*see* Magistrate's Court.

Appointment, power of, *see* Will.

Arrha, *see* Purchase.

Articled Clerk, *see* Attorney.

Assets and debts, *see* Partnership.

Assignation, *see* Bailment.

Assignment, *see* Lease.

"At," meaning of, *see* Illegal impounding.

Attachment *ad fundandam jurisdictionem*—Relative value of property attached.

Where in an application for attachment ad fundandam jurisdictionem, *attachment of property valued at* £2,000 *was prayed, the amount in dispute being only* £21, the Court *ordered attachment of a portion only of the property.*

Van den Heever v. Krugor... ... 108

2. ——*see* Appeal.

PAGE

3. ——*see* Execution.

4. ——*see* Pledge.

5. ——Previous execution — Funds in Sheriff's hands—Practice.

Where a balance from the proceeds of a previous execution remained in the hands of the Sheriff, the latter refused to satisfy a subsequent judgment debt therewith except under an express order of Court.

Macintosh v. Botha 51

6. ——*see* Ship.

Attorney—Articled Clerk—Practice.

A., *an attorney who was qualified to practise in the superior Courts of Scotland, came to the Colony, and after having served in the Colony under articles for one year applied for admission as an attorney of the Supreme Court.*

The Court *ordered the admission but held, that the proper practice for applicants with similar qualifications is to apply beforehand for leave to serve the year required in the Colony and not to serve the year before making any application to the Court.*

Smith, *ex parte* 122

2. ——Certificates, *see* Circuit.

3. ——*see* Magistrate's Court.

4. ——Professional Misconduct—Breach of trust—Satisfactory explanation—Law Society—Delay—Costs.

An attorney was called upon, at the instance of the Law Society, to show cause why he should not be struck off the rolls for having committed a breach of trust.

The alleged breach of trust consisted in the attorney's not paying over to the seller of a farm the balance of the purchase price.

In explanation the attorney stated that he had been instructed by the purchaser, his client, not to pay over the balance, as the farm was not of the extent represented by the seller.

PAGE

The matter was brought to the notice of the Law Society in a letter addressed to that body by the Registrar of the High Court on 16th August, 1895, but no steps were taken against the attorney until four months afterwards.

The Court in accepting the attorney's explanation as satisfactory made no order as to costs.

Incorporated Law Society v. Gardner 8

5. ——Removal from Roll.

Where an attorney of the Supreme Court had collected moneys for a client and having failed to account for them had secretly left the country, The Court *ordered his name to be struck off the roll and directed that the facts should be communicated to the Law Society in England of which respondent was a member.*

Incorporated Law Society v. McColla 85

6. ——Suspension, *see* Circuit.

7 ——Withdrawal of appearance, *see* Entry of Appearance.

Attorney-General, *see* Malicious prosecution.

Auctioneer, *see* Sale.

Bailee, *see* Theft.

Bailment – Deposit—Cession of action —Assignation—Delegation—Novation—Action against substituted debtor—Sale—Credit—Insolvency – Undue preference.

N., *an auctioneer, held a sale of stock, the sale being for cash or (at* N.'s *discretion) at three months' credit, subject to promissory notes being given with endorsees as sureties.*

B. *purchased goats and removed them under a promise to send the required notes, which he failed to do. After various negotiations, however,* N. *consented to accept a bill by* W. *for a portion of the amount, and to allow* B. *to sell the goats (a large number of which had already been placed in* I.'s *hands as an auctioneer) provided the proceeds were remitted to* N.

B. *thereupon signed an order upon* I., *so to pay the proceeds to* N., *and this order* N. *sent to* I. *that day, but the goats then in* I.'s *hands were not sold by him but by* B. *privately. Subsequently,* B. *sold some of the goats to* C., *who asked* I. *to advance the money. A portion of this* C. *drew, and the balance he left in* I.'s *hands to pay* N.; *thereafter* I. *sold more of the goats.*

At the request of B., I. *undertook to send the money to* N. *on the 19th June. But on the 16th June* I. *discovered from a conversation with* B. *that he was in financial difficulties and intending to surrender his estate.* I. *thereupon declined to send the money to* N. *as it would defraud the creditors, and after* B. *had drawn up his schedules on the 18th June,* I. *persuaded* B. *to sign a letter to* I. *authorising him not to pay over the amount to* N.

The surrender was not accepted till the 26th July, and I. *was elected trustee, and declined to pay* N., *holding that he was bound to account to the estate and not to* N., *even though* N. *offered to indemnify him.*

The Court held *that* I. *was merely a depositary, that even if he had been* B.'s *debtor there had been an assignment of* B.'s *right to* N., *acquiesced in by* N. *and* I., *and ordered* I. *to pay the whole amount to* N.

Neser v. Innes 316

Bailor's Negligence, *see* Conveyance.

Balance of Account, *see* Provisional Sentence.

Bank—Joint Stock Company—Colonial branches—Licence duty—Act 3 of 1864, Schedule 17.

A banking company of which the principal place of business is in the

PAGE

South African Republic and of which none of the dealings is by the concession granted to and regulating such company described as to be carried on in this Colony is not liable to licence duty under Schedule 17 to Act 3 of 1864, notwithstanding that under a resolution of directors one or more branches have been established in this colony.

Colonial Government v. National Bank, S.A.R.... 427

Bar of Plea, *see* Procedure.

Barrister — Attorney — Voluntary removal from roll—Affidavit.

The Court *ordered applicant's name to be removed from the roll of attorneys to enable him to enter at the Inner Temple to qualify as a barrister.*

Affidavits sworn in the Transvaal must be made either before a Commissioner of the Supreme Court or before a Justice of the Peace with the counter-signature of the State Attorney.

De Jongh, *ex parte* 85

Barter—Verbal agreement—Condition precedent.

B. *proposed to exchange with* T. *certain heifers and an ox for thirty-two goats and a sheep, it being verbally agreed between the parties that if on delivery, which was to be made on a certain date,* T. *was not satisfied he could return the heifers and reclaim his goats.*

B. *failed to deliver the heifers and the ox on the appointed date, but succeeded in obtaining possession of* T.'s *goats and sheep.*

B., *some weeks after the appointed date, delivered the heifers and the ox, but* T. *refused to accept them.*

T. *sued* B. *for the restoration of his goats and sheep.*

The Resident Magistrate, after hearing T.'s *evidence, granted absolution from the instance, on the ground* inter alia *that no contract had been alleged in the summons and therefore no breach.*

On appeal, *the Court remitted the case to the Magistrate to be tried on its merits.*

Trollip v. Best 490

Benefit of fiduciaries, *see* Will.

2. ——of minor, *see* Will.

Bigamy, *see* Extradition.

Bill of Exchange, *see* Provisional.

Bill of lading—Reservation of liberty to overcarry—Gross negligence of carrier's servants—Damage after transhipment—Shipowner's liability—Merchant's risk—Special agreement—Exceptive clauses—Interpretation—Appeal.

Certain cases of goods were shipped from England to the port of E. *in South Africa, the bill of lading containing a clause "the master or shipowner reserves liberty to overcarry and tranship, or land and reship at any port into any other vessel, at merchant's risk but at steamer's expense, any goods which for any cause whatever may not have been landed during vessel's stay at port of destination."*

The cases, which were properly "port marked," were shipped in a Clan Line steamer, but having been overcarried to the port of D. *they were transhipped thence in good order on to* M.'s *steamer* C., *in which they were taken back to* E.

They were then landed at E. *from the open roadstead on a day on which the port office signals were flying to show that the boats could work, though there was such a heavy sea running, that in the course of the unloading some of the goods were damaged.*

In an action by A. *(the holder, for valuable consideration, of the bill of lading), against the Clan Line Company, the Resident Magistrate*

PAGE

awarded damages to A., *holding that the overcarriage was due to the gross negligence of the company's servants and that the company then became liable for the damages sustained thereafter, including injury sustained, after transhipment, in unloading from* M.'s *steamer* C.

Held on appeal *that, in spite of the words* "any cause whatever," *the correct meaning of the clause in the original bill of lading is and was intended by both parties to be that some cause should operate to make it necessary, advisable, or beneficial for the shipowner to exercise the liberty to overcarry which he had reserved to himself: and that it was not reasonable that indifference or neglect should entitle him to do so unless there was clear express stipulation to this effect. The overcarriage having been proved to the Resident Magistrate's satisfaction to have been due to gross negligence on the part of the Clan Line Company's servants, the company was held to have been rightly adjudged by the Resident Magistrate to be liable for the damage sustained thereafter and the appeal was accordingly dismissed.*

Clan Line Steamers v. Alcock ... 130

Boarding-house keeper — Lien — Luggage.

A boarding-house keeper, who includes in his charges for board and lodging a charge for custody of the boarder's luggage, is entitled to a lien upon such luggage, but has no right to assert the lien by taking possession of the luggage and preventing the boarder from having access to it while the boarder is still staying in the house and has made no attempt to remove the luggage.

Sullivan v. Sutton 489

Bona-fide communication, *see* Slander.

Bona Fides, *see* Insolvency.

PAGE

2. ——*see* Jurisdiction.

Bond—Cession, *see* Insolvency.

2. ——(General) passed as security for Promissory Note—Effect of Prescription of the note, *see* Promissory Note.

3. ——Holder's Consent to transfer, *see* Transfer.

British Bechuanaland Annexation Act, 1895—Magistrate's Court—Pending causes—Final judgment or sentence—Civil imprisonment.

Final judgment having been given before the annexation of British Bechuanaland, by a Resident Magistrate's Court of that territory, for an amount exceeding the jurisdiction which such Magistrate's Court could exercise after such annexation,

Held, *that the Magistrate's Court had no jurisdiction, under the 11th section of the Annexation Act, to issue a writ of execution or grant a decree of civil imprisonment upon such judgment, but that judgment should have been obtained in a higher court, having the requisite jurisdiction, upon the judgment given before annexation.*

Will v. Humphries 4

Business, ordinary course of, *see* Insolvency.

2. ——Place of, *see* Jurisdiction.

Cape Town Council, *see* Municipality.

Capital sum (minor's) used instead of interest, *see* Minor's education.

Carrier's liability, *see* Conveyance.

Carrier's servants' gross negligence, *see* Bill of Lading.

Casual vacancy, *see* Municipality.

Cattle, damage by, *see* Trespass.

Cessation of injury, *see* Interdict.

Cession, *see* Lease.

2. ——of Action, *see* Bailment.

3. —— ——*see* Sale.

4. ——Bond, *see* Insolvency.

Chemist, *see* Liquor Licensing Act, 1883.

Child—Sale of liquor to, *see* Liquor.

PAGE

Child-bearing age—Presumption.

There is no fixed rule of law as to the age at which a woman must be conclusively presumed to be past child-bearing, but after the age of 50 less evidence would be required than before.

Upon an application by executors of M. *for leave to sell certain land bequeathed by him to his daughter* N., *and in case of her decease without issue to certain persons in remainder,* Held, *that as* N. *was fifty-four years of age, and although married for over fifteen years had born no children, proof that her change of life had occurred would complete the presumption that she was past the age of child-bearing, and* ordered, *that upon production of such proof and with the consent of the persons entitled in remainder the sale be authorised.*

In re Estate of Meyer 2

2. ——Transfer Deed.

Where a deed of transfer contained a clause "to A., in trust for . . . . and such other children *as may be gotten* by his wife Martha Wilhelmina Adrianse" *and the Registrar of Deeds refused to pass transfer to the surviving children, as Mrs. Adrianse was still alive though seventy-eight years old,*

The Court *ordered transfer to be passed, as owing to the lady's age no conflict of interests through the birth of further children could be expected to happen.*

Henkes, J. P. J., *ex parte* 99

Children, *see* Will.

Child Stealing, *see* Abduction.

Cigar labels, *see* Trade mark.

Circuit Court Attorney—Conviction on charge of theft—Suspension—Certificates—Notice to Law Society.

Where a Circuit Court attorney had been convicted on a charge of theft, the Court, on the application of the Law Society, suspended him from practice and directed that no application should be made for his reinstatement until three years had elapsed from the date of the Court's order, and then only after notice had been given to the Law Society.

The Court further directed the attorney to deliver his certificates to the Registrar.

Incorporated Law Society v. Milligan 7

Civil Imprisonment, *see* British.

Civil injury, *see* Appeal.

Claims proved in insolvency, reduction of, *see* Insolvency.

Close season, *see* Game offence.

Codicil. *see* Will.

Collateral Security, *see* Provisional Sentence.

Colonial branches, Foreign Joint-stock Co., *see* Bank.

Committal, *see* Extradition.

Common use, *see* Trade mark.

Company, *see* Registration.

2. ——Foreign (Colonial Branches), *see* Bank.

Compensation, *see* Lessor.

Competency of Magistrate to try case, *see* Trial by jury.

Compounding, *see* Doctors.

Concealment of material facts, *see* Derelict lands.

Condition, *see* Insurance.

2. ——Precedent, *see* Barter.

3. ——in title, *see* Trust property.

Condonation, *see* Divorce.

Congregation meetings, *see* Malay Mosque.

2. ——Rights, *see* Malay Mosque.

Conjugal misconduct, *see* Divorce.

Connivance, *see* Divorce.

Consent paper, *see* Rule 319.

Consideration, *see* Donation.

2. ——*see* Provisional sentence.

3. ——Valuable, *see* Insolvency.

PAGE

Construction, *see* Illegal Impounding.

2. ——Statutes—Enrolled agent.

Where the language of a statute is unambiguous it should be construed according to its plain meaning, and not according to what the Court might conceive to have been the real although unexpressed intention of the Legislature.

The 8th section of Act 43 of 1885 enacts that "no person in any district where not less than two attorneys are in practice, shall be admitted and enrolled as an agent."

Held *that a Magistrate cannot be compelled to enrol an agent in a district where three attorneys are in practice, even although they are in partnership with each other.*

De Kock v. Resident Magistrate of Caledon 417

Construction, *see* Will.

Contagion, spread of, *see* Animals' Diseases.

Contemplation of sequestration, *see* Insolvency.

Conveyance of goods—Carrier's liability—Negligence of bailor—Injury in transit—Onus probandi.

P. *received an oil engine from England which had been carried by train and steamer and had passed through various hands before it reached him. Without taking steps to examine into its condition on receipt he delivered it in its case to* B. & Co., *landing and forwarding agents, from whom again he received it at his factory after it had been carried on their wagon for some distance.*

The appliances provided by P. *for his servants to unload the engine from the wagon at the factory were entirely inadequate. On being unpacked the engine was found to be seriously damaged.*

Held, *that in the absence of clear proof that the engine was delivered to defendants for carriage in a sound condition and in view of the probability of the injury having been caused by improper handling by* P.'s *own servants at the factory,* P. *was not entitled to damages claimed from* B. *for the injury.*

Poppe v. Bate & Co. 23

2. ——of land, *see* Executors.

Corroboration, *see* Evidence.

Costs, *see* Appeal.

2. - —*see* Attorney.

3. ——*see* Executor Dative.

4. ——*see* Interdict.

5. ——*see* Malay Mosque.

6. ——*see* Malicious prosecution.

7. ——*see* Municipal Council.

8. ——*see* Plaintiff.

9. ——Previous application, *see* Damages.

10. ——*see* Provisional Sentence.

11. ——*see* Resident Magistrate.

12. ——*see* Ship.

Councillors' election, *see* Municipality.

2. ——*see* Act 45 of 1882.

Counter-claim, *see* Jurisdiction.

2. ——*see* Resident Magistrate's Jurisdiction.

Credit, *see* Bailment.

Creditor and Debtor, *see* Theft.

Criminal appeal — Eastern Districts Court—Remittal of case—Reduction of sentence.

The Eastern Districts Court, on an appeal against a criminal conviction, quashed the conviction on two counts, and made an order remitting the case to the Magistrate for the purpose of passing such sentence as he would have passed if the accused had been convicted only on the third count. The Magistrate thereupon, after due notice to the accused, passed sentence for the payment of a fine of £6 in lieu of the fine originally imposed, viz., £10.

Held, on appeal *to the Supreme Court, that the Eastern Districts*

PAGE

Court had the power to make the order and that the Magistrate had jurisdiction to give effect to the order.

R. v. Loots 151

2. ——Cases—Powers of R.M. to sentence, *see* Resident Magistrate's Jurisdiction.

3. ——Charge, *see* Provisional sentence.

4. ——Conviction, *see* Servitude.

5. ——Offence, *see* Abduction.

6. ——Proceedings, *see* Appeal.

Crops, *see* Insolvency.

2. ——*see* Interdict.

Cross appeal, *see* Appeal.

Crown land, killing ostrichës on, *see* Resident Magistrate's Jurisdiction.

Curator ad litem et bonis, see Intestacy.

2. ——*bonis, see* Lunatic.

3. ——of person, *see* Lunatic.

Custom, *see* Delivery.

Damages, *see* Purchase.

2. ——Cargo (to), *see* Ship.

3. ——Cattle (by), *see* Trespass.

4. ——Costs of previous application —Joint trustees — Misrepresentation—Alleged agency—Rule 329.

O. and F. were appointed joint provisional trustees in the insolvent estate of M.

In connection with the administration of the estate, it became necessary to institute legal proceedings, and O. *and* F. *instructed a firm of attorneys to represent them in the said proceedings.*

The taxed costs of the attorneys amounted to £62 5s. 7d., which amount O. *paid to* F. *on the latter's representation that he was the attorneys' duly authorised agent to receive the same.*

F., *on receipt of the money, signed vouchers, purporting to do so as the attorneys' agent, but he failed to pay the money over.*

PAGE

Subsequently F. *was removed from his trust, and thereafter* O. *tendered an account of his administration, supported amongst other vouchers by those which* F. *had signed on receipt of the £62 5s. 7d.*

The Master refused to accept the account until vouchers had been produced from the attorneys showing that their account had been paid, or until a power from them was exhibited authorising F. *to sign vouchers on their behalf.*

The Master's requirements not having been complied with, he issued a summons against O. *calling upon him to file an account supported by vouchers.* O. *defended the proceedings brought against him by the Master,* The Master v. Mandy's Trustee (6 Sheil, 258), *and in these proceedings* F. *filed an affidavit in which he alleged, in effect, that he was the attorneys' agent to receive the £62 5s. 7d., but the attorneys denied his alleged agency.*

The Court gave judgment against O. *and ordered him to pay the costs of the proceedings* de bonis propriis.

Thereafter O. *paid the attorneys their bill of costs, and on receipt of vouchers for the same the Master accepted the account and it was duly confirmed.*

Thereafter O. *sued* F. *for the £62 5s. 7d., the amount of the attorneys' bill of costs, and also for £28 6s. 2d. as damages, being the costs which he had incurred in defending the proceedings brought against him by the Master.*

Held, *that* O. *was entitled to succeed on both claims.*

Orsmond v. Fitzgerald 408

5. ——Transhipment (after), *see* Bill of Lading.

Death, *see* Will.

PAGE

Debate of accounts — Settlement by promissory note — Objections to accounts rendered — Removal of trial—Costs.

O. *rendered to* V. *an account for professional work done for* V. *This account not being clear* O. *rendered a second account which was fully debated between the parties and* V. *gave* O. *a promissory note in settlement of the amount then found to be due to him.*

On V. *suing* O. *for a proper account,* Held that *the giving of the promissory note though not conclusive gave rise to a strong* prima facie *presumption (not rebutted by the evidence) of a settlement of the accounts on that date, and as the costs of suit were due to plaintiff insisting on having the account altered and removing the trial from the original court, judgment for defendant was given with costs, plaintiff not succeeding in obtaining any substantial alteration of the accounts.*

Vorster v. Orsmond... 194

Debt, proof of, *see* Insolvency.

Defamation, *see* Slander.

Default, purging, *see* Procedure.

Defect, material, *see* Sale and purchase.

Defence, nullity of, *see* Pleading.

Definitive sentence, *see* Judgment.

Delay, *see* Attorney.

Delegation, *see* Bailment.

Delivery, *see* Pledge.

2. —— Warehouseman — Agent — Remuneration—Custom.

The warehouseman of certain bales of wool at the request of the sellers sent to them a transfer return acknowledging that he had received the wool specified in the return from such sellers on account of the purchasers. The terms of the transfer return were communicated to and acted upon by the purchasers.

PAGE

Held, *that there was a complete delivery of the wool to the purchasers. After such delivery the warehouseman sewed, re-marked, and loaded the bales at the request of the purchasers, who knew that for this work the warehouseman intended to claim reasonable remuneration.*

Held that, *although it had been proved that it was the custom of other warehousemen to include remuneration for such work in their charge against the sellers, the warehouseman was entitled to claim it from the purchasers who had employed him with full knowledge that he did not intend to abide by that custom.*

Court v. Mosenthal 154

Departure from Colony, *see* Malicious arrest.

Deposit, *see* Bailment.

Derelict lands — Act 28 of 1881— Griqua emigrant claims—Sale of application documents—Griqualand East Land Board certificates—Possession—Rule *nisi*—Concealment of material facts.

P., *a Griqua emigrant, under Adam Kok, made application (on the annexation of Griqualand East) to the Land Board for a grant of land. Though the application was refused he sold his rights under it to* J., *who took no further steps.*

Subsequently the Land Board granted the application and he then sold his rights to W., *who paid the survey and transfer expenses and arranged as to obtaining transfer to* P. *and to himself.*

P. *left the Colony and transfer could not be passed.* J.'s *executrix claimed title under Act 28 of 1881 and obtained a rule* nisi. *On the return day,*

The Court *discharged the rule on the ground that though the sale to* J. *was earlier than that to* W., *yet that*

PAGE

W. had taken steps to secure his title and had possession of the land and the title deed, which facts had been concealed when the rule was granted.
Van Wyk v. Wildridge 395

Descendants, *see* Transfer Duty.

Description of land, *see* Interdict.

Desertion, *see* Divorce.

2. ——from service, *see* Appeal.

Designs, *see* Trade marks.

Detention, unlawful, *see* Magistrate's Court.

Diagrams, *see* Interdict.

2. ——*see* Trespass.

Discrepancy, *see* Interdict.

Disinheriton, *see* Will.

Dissolution, *see* Partnership.

2. ——of marriage, *see* Will.

Distinctive mark, *see* Trade mark.

District Registrar — Summons — Provisional sentence—Rule 327.
A Magistrate's Clerk has no authority, under Rule 327, to issue a summons for provisional sentence.
Woodhead, Plant & Co. v. Petersen & Co. 497

Diversion, *see* Trespass.

Division among all children, *see* Will.

Divisional Council Liability, *see* Appeal.

Divisional Council — Rates — Lien — Tacit hypothecation — Receipt — Transfer—Insolvent estate.
Where a person, who has bought land from an insolvent estate, tenders payment to the Divisional Council of road rates accruing due during his occupation, such Council cannot refuse acceptance of such rates and so prevent transfer of the land to him until all arrear rates due by the insolvent estate have been paid.
Smuts v. Cathcart Divisional Council 384

Divorce — Adultery — Conjugal misconduct—Desertion — Condonation — Connivance—Recrimination.

PAGE

In an action for divorce on the ground of the defendant's adultery, it is no valid defence that the plaintiff had by reason of his or her refusal to cohabit with the defendant conduced to the defendant's adultery, and it makes no difference whether such adultery was committed by the wife or the husband.
Hasler v. Hasler 413

2. ——*see* Edictal citation.

3. ——*see* Evidence.

Doctors — Medicines — Compounding—Sale—Licence—Act 34 of 1891, section 60.
C., *who was licensed as a medical practitioner but not as a chemist and druggist, attended* B. *in his medical capacity.*
C. *had a special arrangement with a duly licensed chemist by which he was to dispense* C.'s *prescriptions and debit* C. *with the amounts due.*
C. *claimed £4 18s. from* B. *on an account which included charges for medicines supplied.*
The Resident Magistrate gave absolution from the instance with costs to B., *on the ground that* C. *was bound to take out an annual licence as a doctor, and that he had charged for the medicines as if dispensed by himself, when, as a fact, they had been purchased by him.*
The Court on appeal *gave judgment for the charges as medical practitioner and absolution from the instance on the charges for medicines supplied.*
Conroy v. Bezuidenhout 326

Dogs, *see* Animals' diseases.

Domicile, *see* Edictal citation.

2. ——*see* Insolvency.

3. ——*see* Plaintiff.

Donation—Prohibition of alienation—Transfer—Practice.
A. *gave land to his children by a deed of gift containing a bare general*

PAGE

prohibition of alienation. The Registrar of Deeds refused to pass transfer of a portion of the land subsequently sold.
The Court *on the application of the donees granted leave for the sale of the land and ruled that applications must be made to the Court for its consent in similar cases.*
Clark, E. L. C., Petition 151

——by Parent, *see* Minor Children.

3. ——Registration—Consideration.
A donatio inter vivos, *which has been accepted by the donee, but the subject matter of which has not been delivered to him, can only be enforced, as against the donor's executors, to the extent of £500, unless it has been duly registered.*
Van As v. Nel and Nel's Executors 471

Earnest, *see* Purchase.

Eastern Districts Court, *see* Criminal Appeal.

Edictal citation — Domicile — Jurisdiction—Divorce.
Where it appears on the face of a petition for leave to sue by edictal citation that the defendant is not domiciled in the Colony, such leave will not be granted unless jurisdiction has first been founded by virtue of an arrest of the defendant or an attachment of his property.
Walker v. Walker 388

Education of minor, *see* Minor.

Ejectment, *see* Jurisdiction.

2. ——*see* Provisional sentence.

Election, *see* Municipal Council.

2. ——*see* Will.

3. ——of Councillors, *see* Municipality.

4. —— ——*see* Act 45 of 1882.

5. ——Doctrine of, *see* Will.

Enrolled agent, *see* Construction.

Entry of appearance—Withdrawal of attorney—Rule 329D.
Headley Bros. v. Power 224

Erased indorsement, *see* Provisional sentence

PAGE

Evidence—Accomplice—Corroboration.
A prisoner may be convicted entirely on the evidence of an accomplice provided there is some proof aliunde *of the actual commission of the crime.*
Regina *v.* Swart 102

2. ——Divorce—Plaintiff's poverty.
Where a plaintiff in a divorce suit, who resided in Namaqualand, was unable owing to poverty to come to Cape Town to be present at the trial, the Court allowed his evidence to be taken on commission before a Resident Magistrate.
Eyth v. Eyth 33

3. ——*see* Extradition.

4. ——*see* Extrinsic evidence.

5. —— Loss sustained by estate, *see* Surety bond.

6. ——*see* Party to suit.

Exception, *see* Magistrate's Court.

2. ——*see* Pleadings.

3. —— of judgment — Attachment — Sale of life interest—Notice.
Teubes, A. G. H., petition of ... 149

4. ——*see* Attachment.

Executors — Administrators — Trust funds—Improper investment—Will —Partnership.
Where executors or administrators have dealt improperly with the trust funds which it was their duty to invest in a particular manner, the beneficiaries can elect whether they shall claim the sum which would have been due if the investments had been properly made, or whether they shall claim the full sums realised by means of the unauthorised dealings.
An administrator who has improperly paid trust funds to his co-administrator is entitled to an order compelling such co-administrator to join with him in investing the money in the manner directed by the will, but, on the other hand, he is liable to an action at the suit of the beneficiary to compel him to make

PAGE

such investment, even although the co-administrator may be entitled to a life interest in the funds.
Atmore v. Chaddock 181

2. ——*see* Joint Will.

3. ——*see* Liquidation account.

4. ——dative—Appointment set aside—Improper conduct—Costs.
A. *was appointed executor dative in the estates of* H. *and* F.
Upon M. *giving notice of his intention to apply to the Supreme Court for an order joining himself with the respondent as co-executor,* A. *wrote to* M. *a scurrilous and abusive letter.*
The Court *set aside the appointment of* A. *and appointed an independent third person as executor in the estate, ordering costs to come out of the estate.*
Aling, Estate of 108

5. ——Dative, interest in sale under mutual will, *see* mutual will.

6. —— ——*see* Surety bond.

7. ——Testamentary—Long absence from the Colony—Land—Conveyance.
Under special circumstances the Court authorised three executors testamentary, the fourth being long absent from the Colony, to pass transfer of land vested in the estate to a purchaser.
Dawson's Executors, *ex parte* ... 33

2. —— ——Physical infirmities—Cancellation of appointment.
Halse, H. J. & A., Estate 141

3. —— ——Release from trust.
Where executors testamentary had completed their duties, as such, and were merely administering certain investments, the Court, at their request, relieved them from their trust, and appointed an administrator in their place on his finding security to the satisfaction of the Master.
Frost and Southey, *ex parte* ... 10

PAGE

Exemptions from Transfer Duty, *see* Transfer Duty.

Expenses, *see* Ship.

Expropriation, *see* Interdict.

Extension of protest, *see* Ship.

Extradition—Bigamy—Act 22 of 1882—Committal—Evidence—Procedure.
B., *a medical practitioner carrying on business in the Free State, received a citation to answer an action for divorce instituted against him in England.*
While at Cape Town on his way, as alleged, to England he was arrested at the request of the Free State authorities and proceedings were taken for extradition on a charge of bigamy, he having been married in the Free State subsequent to the date of the marriage which was alleged in the English proceedings to have taken place, but which was denied by B. *to have ever taken place.*
The Resident Magistrate not being satisfied with the evidence before him did not commit the prisoner, but remanded him three times to enable further evidence to be obtained. On application by B. *for discharge from custody,*
The Court *ordered the release, the Crown offering no objection and the Free State authorities not being prepared with further evidence in the matter.*
Beddy, *ex parte* 276

Extrinsic Evidence, *see* Provisional sentence.

2. —— ——*see* Will.

False imprisonment—Malice—Reasonable and proper cause.
S. *was arrested on a charge of stealing a sheep belonging to* M. *The loss of the stock was reported by* M. *in due course to the headman of the location, who reported to the inspector. The latter sent for the police, who arrested* S. *with others;*

PAGE

one of whom had acknowledged his guilt and charged S. *with being an accomplice.*

S. *was acquitted and brought an action for damages for false imprisonment against* M. *before the Resident Magistrate and obtained judgment for £10. On appeal,*

The Court held *that there was no proof of malice or want of reasonable and proper cause on part of the appellant and upheld the appeal.*

Moetsi v. September 359

2. ——Representation, *see* Sale.

Falsehood, wilful, *see* Malicious prosecution.

Family, *see* Will.

Father—Guardian substituted—Tutor dative.

L., *who became involved in financial difficulties, went to the Transvaal, leaving behind him in the Colony his four children. In the Transvaal he married again and he settled down there permanently.*

The four children were minors entitled to certain properties in this colony which had belonged to their mother under an ante-nuptial contract: the rents to be paid to their guardian during minority.

Before leaving the Colony L. *nominated* B *to be the tutor of the minors, and thereafter practically contributed nothing to their support.*

The Court ordered *the confirmation of this appointment.*

Re Minors Leach 328

Fencing—Act 30 of 1883, section 7—Hennings v. Grobler 218

Fidei-Commissum, *see* Will.

Final judgment, *see* British.

Following up water, *see* Illegal impounding.

Foreign Company, Colonial branches, *see* Bank.

Forfeiture, *see* Will.

Further proceedings, *see* Interdict.

PAGE

Future Rights, *see* Illegal impounding.

2. —— ——*see* Jurisdiction.

Game offence — Close season — Act 36 of 1886, section 5—*Particeps criminis*—Accomplice.

B. *while walking with dogs started a bushbuck, and proceeded to hunt it, though the period of the year was a close season in the district.*

R., *the occupier of the land, watched the hunt, and when the buck took to the water called on* M. *on the other side of the river to stop the buck; then pointed out to the men where the buck was hiding. They killed the buck and asked* R. *what they should do with it, when he told them they might keep it.*

R. *was charged with contravention of section 5 of Act 36 of 1886 and found guilty.*

On appeal the Court *sustained the conviction.*

Regina v. Robertson and Others ... 389

General Bond, *see* Promissory note.

Grant—Prescription.

H., *in an action for a declaration of rights, claimed certain Crown land, his claim being based partly on grant and partly on prescription.*

Held (1) *that the land was not included in the grant, and* (2) *that, as to the claim by prescription, the mere fact that the plaintiff and others had pastured their cattle for thirty years and upwards on the land in dispute, the Government offering no opposition, was not sufficient to establish a prescriptive right, as against the Crown, to the ownership of the land.*

Barrington's Executor v. Colonial Government 505

2. ——*see* Trespass.

Griqua emigrant claims, *see* Derelict lands

Griqualand East Land Board certificates, *see* Derelict lands,

PAGE

2. ——West Deeds Registry, *see* Insolvency.

Gross irregularity, *see* Appeal.

2. —— ——*see* Municipal Council.

3. ——Negligence, *see* Bill of lading.

Grosse — Notarial Bond — Provisional sentence.

Raaff v. Fitzgerald 1

Guardian substituted, *see* Father.

Guilty intention, *see* Liquor.

Harbour Board, *see* Interdict.

Heirs, *see* Transfer Duty.

2. ——Consent, in absence of, *see* Mutual will.

3. —— ——of Minors, *see* Mutual will.

4. ——Purchase of property in estate, *see* Mutual will.

Holder, legal, *see* Provisional sentence.

Holograph will, *see* Minors.

2. —— ——*see* Will.

Husband and Wife, *see* Joint will.

Illegal Impounding, *see* Appeal.

2. —— ——Trespass — *Servitus aquæhaustus* — Following up water — Meaning of "At" — Construction —Future rights.

S. *leased a portion of the farm* C. *from* R. *who subsequently sold* C. *to* L. *In terms of the lease* S. *had the right to water his stock "at the well" on a portion of* C., *which was not leased to him; together with a right of passage for his sheep to and from the water.*

S. *continued to exercise this right till* L. *seized a large quantity of his stock and impounded them; and after detaining them for some days, released them short in number as* S. *alleged.* S. *brought an action for damages for illegal impounding.*

The Resident Magistrate found that the defendant had commenced to construct a furrow to lead water from the well, but had abandoned it on plaintiff's protest; that the water in the furrow was from the well; and that plaintiff was entitled to the use of the water at any part of the furrow. He gave judgment for plaintiff with costs.

On appeal, the Court held *that as the spot where* S. *had watered his stock was about 300 yards from the well he had gone further than a strict construction of his right to water stock "at the well" would allow, and altered the Resident Magistrate's judgment to one of absolution from the instance.*

Liebenberg v. Stewart 410

Illegitimate children, *see* Will.

Illiquid summons, *see* Surety bond.

Imaum, appointment, *see* Malay Mosque.

Immovables in Colony, *see* Appeal.

Impounding illegally, *see* Appeal.

2. —— ——*see* Illegal impounding.

Improper conduct, *see* Executor Dative.

2. ——Investments, *see* Executors.

Improvements, *see* Lessor.

Incola, *see* Plaintiff.

Indictment, *see* Abduction.

2. ——*see* Appeal.

Indorsement erasure, *see* Provisional sentence.

Inheritance, *see* Transfer.

Injury by a bull—Negligence—Liability.

D. *had some cattle, which he left with* I. *during his absence from home. After his return* D. *lived with* I., *their cattle running and being kraaled together. During this time a bull belonging to* D. *injured* S.

D. *alleged that the cattle were with* I. *under a contract of depositum and that* I. *was liable for the negligence, and the Resident Magistrate gave judgment of absolution from the instance, though* D. *in evidence stated that he and* I. *together took the cattle to* S.'s *place on the morning of the accident and left the cattle unattended.*

Held on appeal, *that the evidence showed that the cattle were in the*

PAGE

custody of D. *and that he was liable for the negligence, and the Court ordered the case therefore to be remitted to the Resident Magistrate to assess the damages.*

Swarts v. Dice 128

2. ——In course of employment, *see* Master and servant.

Injury - Negligence - Trespass.

K. & Co., *who were drainage contractors, made excavations in a lane adjoining* F.'s *house, and in the course of the work undermined and exposed the foundations of* F.'s *house.*

F. *sued for damages, alleging that the work had been performed in a negligent manner.*

The boundary line of F.'s *property extended some inches into the lane, whilst the excavations extended right up to the foundation walls, thus coming into* F.'s *area.*

The Court held that *the defendants were negligent in allowing the work to be performed under the supervision of an incompetent foreman, and in excavating within the plaintiff's area in the way they had done, and gave damages against the defendants.*

February v Brandon, Kirby & Co. 443

Insolvency, *see* Appeal.

2. ——*see* Bailment.

3. — *see* Lease.

4. - —*see* Lessor.

5. ——Mala-fide alienation— Valuable consideration — Bona-fides— Ordinance 6 of 1843, section 83—Onus probandi.

A. *and* B. *were engaged to be married. In order to secure some provision for* B. *they agreed that she should take over from* A. *certain landed property (of a Divisional Council valuation of £550) belonging to him, she taking over in satisfaction of the purchase price all*

PAGE

liability for a bond of £300 then existing over the property, with interest.

Subsequently A. *surrendered his estate as insolvent and was afterwards convicted of fraudulent insolvency.*

Though the actual contract of sale took place before marriage and at a time when it was not proved that A. *contemplated insolvency, the formal transfer of the land was not made till a much later date; after the marriage and when* A. *was actually insolvent.*

The trustee brought an action under section 83 of the Insolvent Ordinance, No. 6 of 1843, to set aside the alienation as mala-fide.

Held that, *the defendant on whom under the circumstances lay the onus of proof of* bona-fides *in the original transaction having shown that the contract of sale was originally made* bona-fide *and for valuable consideration, she was entitled to the property; even though the formal transfer was made at a time when* A. *was no longer solvent.*

Cilliers' Trustees v. Cilliers 91

6. —— Mortgage — Lease - Crops — Rent paid in advance.

The owner of land, having mortgaged and thereafter leased it, became insolvent;

Held *that the trustee of his insolvent estate would be entitled either to denounce the lease in case the land, when offered for public sale subject to the lease, should not realise sufficient for the payment of the mortgage debt, or to institute an action to set aside the lease without first offering the land for sale subject to the lease, in case it had been entered into in fraud of the creditors, but that, until the lease is so denounced or set aside, the lessee is entitled to reap the crop sown by him upon the land.*

Van Wyk v. Van Wyk.—Trustee of 504

PAGE

7. ——Preference — Griqualand West Deeds Registry—Domicile—Act 39 of 1877, section 29.

S. *while domiciled in Griqualand West passed a bond in favour of* P., *which was duly registered in the Griqualand West Deeds Registry Office.*

Thereafter S. *became domiciled in the Colony proper, where his estate was sequestrated as insolvent.*

Held that, *in view of the provisions of section* 29 *of Act* 39 *of* 1877, *the preference under the bond extended only to the assets within Griqualand West and that the Master could not consistently with the rights acquired by creditors under a sequestration in the Colony proper award any preference in respect of the assets outside Griqualand West.*

Peach & Co. v. Simon's Trustee ... 87

8. —— Proof of debt — Cession of Bond—Ord. 6 of 1843, sections 27 and 130.

De Klerck v. Winterbach 190

9. —— —— Subsequent sequestration —Act No. 38 of 1884, section 17.

The right of creditors under the 130*th section of the Insolvent Ordinance, to prove upon an insolvent estate for the balance of debts owing to them under a previous insolvency, is not taken away or affected by the* 17*th section of Act* 38 *of* 1884.

Le Roux, in the Insolvent Estate of 60

10. —— ——Unliquidated damages — Second insolvency — Section 180, Ordinance 6 of 1843.

A claim for unliquidated damages should be substantiated by action, and not proved as a debt, against an insolvent estate.

A proof against an insolvent estate under a second sequestration made by virtue of the 130*th section of the Insolvent Ordinance should be in respect of the original debt and not of the account confirmed under the previous sequestration.*

A bare proof for the alleged value of improvements made on an insolvent's land having been admitted and the account confirmed, the insolvent surrendered his estate for a second time. The claim was again proved in the second insolvency, without any account or vouchers in support thereof. On the application of a creditor, who became such after the first insolvency, the Court ordered the proof of debt to be expunged, with leave to the respondent to substantiate his claim by action.

De Klerck v. Zeeman 192

11. ——Purchase of shop goods by insolvent — Liability of insolvent to action— Permission to trade — Ordinance 6 of 1843, section 71.

B.'s *estate was sequestrated in 1885. Meetings were called, but no creditors attended and no trustee was elected.* B. *thereafter bought shop goods, but in an action excepted that he was insolvent and the Resident Magistrate upheld the exception.*

On appeal,

The Court held *that the Resident Magistrate had wrongly upheld the exception, and that* B. *was liable to be sued.*

Macfarlane v. Brunette 278

12. ——Set-off — Trustee's powers — Section 28, Ordinance 6 of 1843— Reduction of claims proved—Section 3, Ordinance 6 of 1843.

H. *hired a farm from* N. *for a year at a rental of £75, the rent however to be £50 only should* H. *construct a dam on the farm.* H. *paid £25 rent in advance.*

Before the expiry of the year and when the dam was not quite completed H. *became insolvent.* N. *claimed and proved preferently in the insolvent estate for the balance of £50 rent.*

PAGE

L. (*the trustee*) *however, after the claim was proved in the estate, reduced* N.'s *claim for* £50 *by setting off* £18 *for work, labour, and materials spent on the dam and awarded* N. £32 *in the distribution account.*

The Court, *on objection by* N. *to the confirmation of the distribution account, ordered the matter to be returned to the Resident Magistrate to determine the question of set-off.*

Van Niekerk v. Hugo's Trustee ... 124

13. ——Undue preference — Ordinance 6 of 1843, sections 84 and 86—Contemplation of sequestration—Ordinary course of business—Act 38 of 1884—Onus.

N., *a "togtganger," paid* A. £130 *shortly before the sequestration of his estate.*

A. *set up the defence that the payment was made in the usual course of business, at a time when there was no contemplation of insolvency. It was proved that* H. *was actually insolvent at the time the payment was made, but that some of the rest of the debts were old debts for which the creditors would not have pressed.*

The Court held *that under the circumstances of the case the defendant had rebutted the presumption raised by Act* 38 *of* 1884, *section* 8, *and that at the time the payment was made there was no actual contemplation of insolvency and that the payment was made in the way of business usual with men of* N.'s *calling.*

Neethling's Trustees v. Alford, Wills & Co. 335

Insolvent, *see* Writ of arrest.

2. ——Estate, *see* Divisional Council.

Insurance — Condition — Particular account—Waiver—Time limit.

In an action on a policy of fire insurance on merchandise, containing the condition that the insurer shall deliver a particular account within fifteen days after the loss or damages, or such further time as the company might allow, it appeared from the correspondence that eight days after the fire the plaintiff asked for seven days in addition to the fifteen, that the company refused to grant the extension, that after the expiration of the fifteen days the company informed the plaintiff that no steps for payment would be taken unless he supplied a proper account, that after a long delay the plaintiff practically refused to render such account and gave notice of his action, and that thereupon the company, acting on such refusal, notified to the plaintiff that it declined to pay even if the account should still be rendered.

Held, that *the company was not bound to accept an account tendered after such notification, and that waiver of the time limit of fifteen days did not amount to an indefinite extension of the time for delivering the account.*

The case of *Hollander* v. *Royal Insurance Company* (4 Juta, 66) distinguished.

Schweizer, N.O. v. Sun Fire Insurance Co 476

Intention, guilty, *see* Liquor

2. —— of testator, *see* Will.

Interdict, *see* Appeal.

2. ——Crops.

Interdict granted restraining the alleged lessees of a farm from reaping the crops, the lease being alleged to have been granted mala-fide *by the lessor, who had subsequently become insolvent.*

Van Wyk, Insolvent Estate ... 491

3. —— Expropriation — Land — Railway Company—Harbour Board —Act 23 of 1889—Act 36 of 1896 —Private Railway Act—Description of land—Diagrams—Discrepancy.

The Metropolitan Railway Co. held

PAGE

certain land on lease from the Government subject to termination at three months' notice.
On the promulgation of Act 36 of 1896 the company notified the Board (in whom the land became vested in terms of the Act) of their intention to expropriate under the powers alleged to be vested in them by Act 23 of 1889.
The Board thereon gave notice to terminate the lease, and applied for an interdict to prevent the company proceeding with the expropriation.
The Court held that *the company had not the powers of expropriation claimed, as the land required did not fall within the local limits of deviation defined by the Act.*
Table Bay Harbour Board v. Metropolitan and Suburban Railway 372

4. ——*see* Lease.

5. - *see* Partnership.

6. ——*see* Provisional sentence.

7. ——*see* Trade mark.

8. ——Trespass — Cessation — Admission of injury—Further proceedings—Costs.
O. *trespassed on* C.'s *land, whereupon* C. *took legal proceedings to obtain an interdict against* O.
O. *thereupon admitted that he was not entitled so to trespass and promised cessation of the injury. Nevertheless* C. *continued the legal proceedings.*
The Court *refused the interdict and granted costs up to the date of the admission and promise only.*
Schaap v. Solomon 397

9. ——*see* Water.

Interest, *see* Slander.

Interlocutory order, *see* Appeal.

2. ——Sentence, *see* Judgment.

Interpleader, *see* Pledge

Interpretation, *see* Bill of Lading.

PAGE

Intestacy—*Curator ad litem et bonis*—Ordinance 104, section 19.
Where A. *died intestate and it was necessary that proceedings for arrest of a debtor in the estate should be taken at once without waiting for the appointment of an executor dative,*
The Court *directed that the appointment of* curator bonis *should be made by the Master in the usual way under section* 19 *of Ordinance* 104 *of* 1833, *and that such curator should have the power to take the requisite legal proceedings.*
Melass, A., Estate 115

Intoxication, *see* Provisional sentence.

Irrigation, *see* Trespass.

Issue, *see* Will.

Jettison, *see* Ship

Joint offence, *see* Appeal.

2. ——Stock Co., *see* Bank.

3. ——Trustees, *see* Damages.

4. ——Will—Husband and wife—Executor—Legatee—Transfer—Mortgage — *Rei vindicatio* — Tacit hypothecation.
Husband and wife, married in community, made a joint will, by which, inter alia, *they bequeathed a certain farm to the plaintiff subject to a usufruct in favour of the survivor. The husband was the survivor and accepted benefits under the will, the land stood registered in his name, and after taking out letters of confirmation as executor of his wife's estate, he transferred one-sixth share of the farm to the defendant.*
Held, *in an action brought by the plaintiff to set aside the transfer, that the plea that the transfer had been made* bona-fide *for valuable consideration without knowledge of the plaintiff's rights under the will was a valid answer to the declaration.*
Williams v. Williams 216

PAGE

Judgment — Interlocutory sentence — Definitive sentence — Mistake — Jurisdiction — Alteration of judgment.

A prisoner, before being arraigned on a charge of theft, objected to being tried on the indictment on the ground that the place where he was committed for trial was outside the limits of the district of the committing magistrate. The presiding judge sustained the objection but, upon its being proved before him on the same day that the objection was founded upon a mistake of fact, he ordered the trial to proceed. Notice was accordingly given to the prisoner that he would be tried on the following day on the same indictment.

Held, *upon a question reserved after conviction and sentence, that as the order sustaining the prisoner's original objection was interlocutory and incapable of being appealed against, the presiding judge had the power to correct his own order.*

Regina v. Shaw 70

Judicial Discretion, *see* Resident Magistrate.

2. — - Separation — Deed — Rule of Court.

Where husband and wife had executed a notarial deed of separation a mensa et thoro, *the Court, on the application of the wife, refused to make the deed a rule of Court.*

Croker v. Croker 20

3 — — — *see* Rule 319.

Jurisdiction, *see* Appeal.

2. — — *see* Edictal citation.

3 — — *see* Judgment.

4. — - *see* Magistrate's Court.

5. —— Magistrate's Court — Future rights—Ejectment —Action for rent —Act 20 of 1856, section 10.

In an action for rent under a disputed lease it is not a valid ground of exception to the Magistrate's jurisdiction that future rights are involved if the rent for the premises for the whole period of the lease does not exceed the sum of £20.

In an action for ejectment, however, from the same premises he has no jurisdiction if it is shown to his satisfaction that the right to the occupation for the unexpired portion of the lease is to the defendant of the clear value of £40 *or upwards in terms of the last proviso to the* 10*th section of Act* 20 *of* 1856.

Gadiega v. Ebriem 146

6. ——Resident Magistrate — Counter-claim — *Bona-fides*—Merits of case.

A. *was sued by* B. *for* £39 19*s.* 8*d.*, *balance of an account for goods sold.* A. *excepted to the jurisdiction of the Resident Magistrate, in that he had a counter-claim of* £51 1*s.* 9*d.*, *commission fees due.*

The Resident Magistrate, to satisfy himself as to the bona-fides *of the counter-claim, took evidence and called the defendant. But the Resident Magistrate not being satisfied then, interrogatories were administered to the plaintiff. No objections were raised by defendant till the receipt of the answers, when he objected to their being read. Finally, the Resident Magistrate after reading the answers overruled the exception.*

Held on appeal *that the Resident Magistrate must confine himself to the question of* bona-fides *of the defendant's claim in reconvention, and that as in this case he had not done so the appeal must be upheld.*

Theron v. Tiffin 305

7. —— ——Residence of defendant—Place of business—Act 20 of 1856, section 8.

The defendant resided at Wynberg and carried on business in Cape Town under the style of F. C. & Co.

In an action before the Resident

PAGE

Magistrate, Cape Town, the case was dismissed on the exception being taken that as defendant resided at Rondebosch, in the district of Wynberg, the case should have been brought before the Resident Magistrate of Wynberg.

Held, on appeal, *that the exception was good, and that the fact of the defendant carrying on business in Cape Town under the style of a company was immaterial in this connection.*

Scott v. Clarke & Co. 53

8. ——*see* Title to land.

Jury, tampering with, *see* Malicious prosecution.

Justification, *see* Libel.

2. ——*see* Slander.

Knowledge of barman, *see* Liquor licence.

Land, *see* Interdict.

2. ——Transfer, *see* Executors.

Landed property, *see* Transfer.

Law Society, *see* Attorney.

2. ——Notice to, *see* Circuit.

Lease—Alterations by lessee—Interdict.

A. *hired from* B. *a portion of* B.'s *house and wished to break down a portion of the building and make considerable alterations against* B.'s *wishes.*

Held, *on application for an interdict, that* B. *was entitled to restrain* A. *from making the proposed alterations as, though a tenant might in certain cases be entitled to make alterations in premises leased by him, in this case the alteration would prejudicially affect the landlord in the use and occupation of the remainder of the property.*

Darroll v. Thompson and Another 241

2. ——*see* Insolvency.

3. ——*see* Provisional sentence.

PAGE

4. —— Sub-lease — Cession — Assignment — Insolvency — Urban and rural tenements.

Where land has been leased which exceeds in extent what is required for the proper use and full enjoyment of any house on it such land must, for the purposes of the lease, be regarded as a rural tenement.

The insolvency of the lessee puts an end to the lease in terms of the 104th section of the Insolvent Ordinance unless before his insolvency the lessee had made a complete transfer of rights to an assignee, and such transfer would not be deemed complete unless the lessor had accepted the assignee as his tenant in lieu of the lessee.

Nieuwoudt v. Slavin and Another 79

Legacy of property of third person, *see* Will.

Legal fraud, *see* Sale.

2. ——Holder, *see* Provisional sentence.

Legatee, *see* Joint Will.

Lessor—Lessee—Sub-lessee—Tacit relocation — Rent — Insolvency — Improvements.

The lessee of certain premises, being bound by his lease to make certain improvements during his seven years' term, made such improvements and thus considerably enhanced the value of the land. In the meantime the lessors gave the right of obtaining a lease of the premises at the expiration of the seven years to K., *who did not, however, obtain such lease but ceded his right to the original lessee. After the expiration of the seven years such lessee continued to occupy the premises without obtaining a renewed lease from the lessors, who were aware, however, of his continued occupation. He paid the rent to* K., *without the knowledge of the lessors, for eight years. After the expiration of such eight years the lessors for*

PAGE

some time received rent, on the original basis, from the lessee, but afterwards claimed increased rent for the preceding eight years by reason of the enhanced value of the land.

Held (1) that *payment to* K. *without the knowledge or consent of the lessors did not absolve the lessee from liability for rent for the eight years, but* (2) *that such rent should not exceed the sum stipulated for by the original contract of lease.*

The sub-lessee of certain other premises, having made certain improvements thereon, and having thereafter been ejected by the original lessors on the ground of the lessee's insolvency, obtained judgment against such lessors in an action for the value of such improvements.

Held that *such lessors were entitled, in reconvention, to recover the full value of such sub-lessee's use and occupation subsequent to the lessee's insolvency upon the basis of the enhanced value of the land.*

Parkin v. *Lippert* (5 Sheil, 211) approved.

Lippert v. Parkin 168

2. ——and lessee — Improvements — Materials — Compensation — Tacit hypothec.

The tenant of premises on a monthly tenancy placed a fence round the premises with the consent of the landlord and afterwards upon receiving notice to quit she claimed from him, as compensation, the then value of the materials and gave notice that failing payment she would remove the materials before the expiration of her tenancy. The landlord refused to pay compensation and prohibited the removal of the materials.

Held that, *although the landlord had transferred the land before the expiration of the tenancy, the tenant was entitled to recover the value of the materials from him as the person*

PAGE

who had let the land to her, with whose consent the improvements had been made, to whose land the materials had been annexed, and who, during the subsistence of the lease, had prohibited the removal of the materials.

Gibson v. Frost 178

3. ——*see* Provisional sentence.

Liability of insolvent to action, *see* Insolvency.

Libel—Justification—Public benefit—Self-protection.

A., *the manager of a newspaper, published a notice in his paper informing the public that* C. *had been receiving subscriptions therefor and that* C. *had no authority to do this.*

In an action by C. *for libel the Resident Magistrate holding that* C. *had wrongfully received money from* D. *as such subscriptions, though he did not supply the papers and was not authorised to receive the subscriptions, gave judgment for* A.

Held on appeal *that even if the words were defamatory,* A. *was amply justified in publishing the notice as there had been at least considerable negligence on* C.'s *part, and it was for the benefit of* A. *and of the public that such a notice as that complained of should be given.*

Clarke v. St. Leger and Others ... 141

Licence, *see* Doctors.

2. ——Duty, *see* Bank.

3. ——For removal of sheep, *see* Scab Acts.

Licensing Act, *see* Liquor.

Lien, *see* Boarding-house keeper.

2. ——*see* Divisional Council.

Life Interest, attachment, *see* Execution.

Liquid document, *see* Provisional sentence.

Liquidation account — Amendment — Executors.

Where a woman's interest under her husband's will was sold in execution

PAGE

of a judgment obtained against her, and was purchased by the judgment creditor, and the husband's executors, in framing their account, debited the estate with an item of £25, being the amount of costs guaranteed by them, in their capacity, to the wife's attorneys to enable her to defend the action,

The Court refused to expunge the item, or to order an amendment of the account, on the grounds that the action was a proper one to be defended.

Glaeser's Executors v. Quin's Executors 9

Liquor licence—Act 28 of 1883, section 73 (clause 1)—Permitting drunkenness—Knowledge of barman.

A. *was found lying drunk in* O.'s *canteen. The evidence showed that the room was full of people and that the barman on having his attention expressly called to* A. *was taking steps to eject him when he discovered that* A. *was in charge of the police.* O. *was convicted on a charge of "permitting drunkenness" on his licensed premises. On appeal,*

The Court held *that "permitting drunkenness" implies actual or constructive knowledge on the part of the licensee or his barman, and as the Magistrate did not find nor was there any evidence of such knowledge on the part of either, ordered the conviction to be quashed.*

Regina v. Otto 261

2. ——— Sunday selling—Premises—Lodger—Act 28 of 1883, section 73—Act 55 of 1891, section 21.

C. *was charged with contravening section 73 (sub-section 7) of Act 28 of 1883 in selling liquor to* A. *on a certain Sunday, or otherwise with allowing* A. *to be in the bar of his licensed premises on Sunday.*

The defence was that A. *was a lodger, having that morning engaged a room to occupy temporarily during the stay of a friend at* A.'s *house.*

PAGE

The Resident Magistrate found that A. *was not a lodger, and* C. *was convicted under section 21 of Act 25 of 1891.*

On appeal *the conviction was upheld.*

Regina v. Richard Curtis 294

3. ——Licensing Act, 1883—Chemist—Medicinal purposes.

If a liquid sold or administered by a chemist be of such a nature that, although it contains spirituous liquor, its ordinary and reasonable use would be only for medicinal purposes, it falls within the exemptions of the 2nd section of the Liquor Licensing Act, 1883, unless the chemist knew or had reason to know that it was bought in order to be consumed for its intoxicating qualities.

Regina v. Armstrong 434

4. ——— ——— Sale to child — Guilty intention—Undisclosed principal.

In a prosecution for selling liquor to a child under fifteen in contravention of the Liquor Licensing Act, 1883, section 73, it is no defence that an adult had sent the child to buy the liquor, if the defendant delivered the liquor in the belief that he was selling it to the child.

Queen v. Deydier 418

5. ——— ——1883—Principal and agent.

In a prosecution for a contravention of the 75th section of the Liquor Licensing Act a principal and his agent cannot both be convicted of the same offence.

A principal and his agent having been so convicted in a Magistrate's Court the sentence upon the principal only was confirmed, that upon the agent being quashed.

Regina v. Nokitsi ini and Drayi ... 436

Locus standi, *see* Municipality.

Lodger, *see* Liquor licence.

Luggage, *see* Boardinghouse-keeper.

PAGE

Lunatic—Debts—Sale of landed property.

Where property in the joint estate of a lunatic and his deceased wife was required to be sold to pay off a debt due by him,

The Court *ordered the sale on the application of the curatrix of his property, who was also the executrix dative of the lunatic's deceased wife; and ordered further that any balance be paid over to Government in satisfaction of a monthly claim of 5s. on the lunatic's estate for his maintenance.*

White, *re*—Whelan, *ex parte* ... 99

2. ——Declaration by Court—Curator of person—*Curator bonis.*

T. *was for many years in the employ of* H. *as bookkeeper.*

After H. *had closed his business* T.'s *mental and physical state underwent a considerable change.*

The Court, *on the application of* H., *declared* T. *to be of unsound mind and appointed curators of person and property.*

Hodgson v. Thomas 68

Magistrate's Court, *see* British.

2. —— ——Act, *see* Title to land.

3. —— ——Jurisdiction—Exception—Unlawful detention—Summons—Value of goods detained.

Where a summons in the Magistrate's Court for the unlawful detention of property alleges the value of the property to be £20, and claims only that amount as an alternative to the claim for the restoration of the property, it is not a valid ground of exception that the property is worth more than £20, and that therefore the Court has no jurisdiction.

Meitje v. Matyele 421

4. —— —— Periodical Court — Agent — Attorney — Practice — Act 43 of 85, section 8.

Where there are two attorneys in practice in any district, one of them practising at the ordinary place for the holding of the Magistrate's Court of such district and the other practising in a Periodical Court of such district, the 8th section of Act 43 of 1885 prevents the further admission of agents, even although a portion of an adjoining district has been defined, under section 10 of Act No. 16 of 1882, as an area over which the Magistrate, holding such Periodical Court, shall exercise jurisdiction.

Van Wyk v. R.M, Willowmore ... 225

5. —— —— Postponement of trial—Appeal.

In an action in a Magistrate's Court against the drawers of a cheque the defendant's agent applied for a postponement on the ground that one of the defendants was not in a fit state of health to attend as a witness, and produced a medical statement which did not fully bear out the statement.

The Magistrate refused the application, whereupon the agent filed his plea and allowed the case to proceed.

Held, *on appeal against a judgment given in the plaintiff's favour, that the Magistrate's refusal to allow a postponement was not a good ground for the appeal.*

Gabb & Fraser v. Greenshields ... 488

6. ——Discretion, *see* Party to suit.

7. ——Jurisdiction — Summons—Specific performance.

Where it appears from a summons in a Magistrate's Court that the substantial object of the action is to obtain damages for a seller's breach of contract, the fact that the summons inappropriately states that it is for specific performance does not oust the Magistrate's jurisdiction.

Distin v. Lamont & Trick 487

Maladministration, *see* Surety bond.

Mala-fide Alienation, *see* Insolvency.

PAGE

Malay mosque—Appointment of Imaum —Rights of congregation—Procedure—Costs.

G., *an Imaum of a Malay Mosque in Cape Town, purposing to leave for Mecca, appointed three gatieps to supervise matters in his absence, and subsequently prior to his departure drew up a document nominating* B., *one of these gatieps, as his successor in the office of Imaum.*

On the death of G. *meetings of the congregation were held for the purpose of electing an Imaum, as both the genuineness and the validity of the document nominating* B. *were questioned and both* B. *and* I. *claimed to have been properly elected thereat.*

The evidence being very conflicting as to the actual result of the election the Court, to test the wishes of the congregation, requested the Registrar to take a poll of the members of the congregation who were such at the date of the election meetings, in order to ascertain how they had voted: the poll resulting in a great majority for B.

Held, *that under the circumstances generally* B. *was the duly appointed Imaum.*

Held further, *that a delay in bringing the action having been due solely to the legal advisers and no real prejudice having been caused thereby to the defendant, the plaintiff was entitled to his costs.*

Jan v. Ismael (5 Searle, 102) *approved.*

Berhardien v. Intillah 41

2. —— ——Imaum—Rights of congregation—Meetings.

Where the members and office-bearers of a Malay mosque applied for an order compelling the Imaum to call a meeting of the congregation for the purpose of electing his successor and of settling disputes in connection with the finances of the mosque, the Court refused to grant the order in the absence of proof of any legal obligation on the part of the Imaum to call such meetings.

Hadjie Salie v. Sahibo 58

Malice, *see* False imprisonment.

Malicious arrest—Reasonable and probable cause — Departure from Colony.

An affidavit for the arrest of a debtor under the 8th Rule of Court should fairly state the facts upon which the deponent bases his belief that the debtor is about to remove, or is making preparations to remove from the Colony.

Any concealment of such material facts as might have induced the Registrar to withhold the writ is evidence of malice as well as of want of reasonable and probable cause in an action for malicious arrest brought by a debtor who proves that he did not intend to depart from the Colony without paying the debt.

Van der Vyver v. Deary 466

2. ——Prosecution—*Actio injuriarium*—*Actio calumniae* —Attorney-General — Solicitor-General — Refusal to prosecute — *Nolle prosequi* — Termination of prosecution.

In an action for malicious prosecution the Attorney-General's or Solicitor-General's refusal to prosecute constitutes sufficient proof of a termination of the prosecution in the plaintiff's favour.

Lemue v. Swaartbooi 424

3. —— —— Reasonable and proper cause—Wilful falsehood—Tampering with jury—Costs.

An action was instituted against C. *for an offence against the Liquor Licensing Act of 1883 and* C. *was found guilty.*

C. *thereupon charged* H. *with perjury, but* H. *was acquitted.*

H. *thereupon sued* C. *for damages for malicious prosecution,*

PAGE

The Court held *that* C. *had reasonable and proper cause for prosecuting* H., *and that* C. *had not committed any wilful falsehood in the affidavit charging* C. *with perjury, and gave judgment for defendant without costs on account of the defendant having tampered with some of the jury prior to the trial for perjury.*

Hopewell v. Conroy 457

Man-stealing, *see* Abduction.

Marriage in community, *see* Post-nuptial contract.

Master and servant, *see* Appeal.

2. —— ——Injury in course of employment—Privity of contract—Requests.

A surgeon who has attended a servant for an injury at the servant's request and not at the request, express or implied, of the master, is not entitled to recover his fees from the master, although the servant may have sustained the injury in the course of his employment.

The surgeon may recover the fees from the servant even although he may at first have debited the master in his books upon the servant's erroneous statement that his master would pay for the necessary attendance.

Fulss v. Molentze 402

Material defect, *see* Sale and purchase.

Materials, *see* Lessor.

2. ——*see* Public Roads.

Mayor, *see* Municipal Council.

Meaning of "At," *see* Illegal impounding.

Medicinal purposes, *see* Liquor Licensing Act, 1883.

Medicines, *see* Doctors.

Merchant's risk, *see* Bill of lading.

Merits of case, *see* Jurisdiction.

Minor, *see* Parent.

PAGE

2. ——Children—Donation by parent—Mortgage of property.

B. at a time when his assets exceeded his liabilities made a donation of landed property to his minor children, reserving to himself a life interest in the rents and profits accruing therefrom.

Subsequently B. *sustained considerable reverses in business and a provisional order for the sequestration of his estate was made.* B. *was thereafter sentenced to two months' imprisonment for assault.*

A sum of only £500 being required to prevent the provisional order becoming final, and thus to prevent the parents' life interest in the landed property being sold in insolvency, there being no other means of support for the children (owing to B.'s *imprisonment),* B. *applied for leave to raise a loan of £500 on security of the landed property of the children.*

The Court *under the special circumstances granted leave, subject to the provisional order of sequestration being discharged and subject to repayment of the loan by* B. *at the rate of £50 per annum.*

Fitchett (minors), *in re* 116

3. —— Landed property—Sale—Debts.

The Court authorised the sale of a farm, purchased by a father on behalf of his minor son, to pay the amount of a bond and other charges on the property.

Jones, *ex parte* 6

Minor's benefit, *see* Will.

2. —— Education — Use of capital sum instead of interest.

In matter Minors Bell 246

3. ——Holograph will—Usufruct.

A. by a will in her own handwriting (but not attested) bequeathed her property to her husband to "use in trust for her children."

PAGE

The husband retained the furniture, advancing money from his own funds to pay the debts of the estate.

The Master refused to recognise the will as valid without an order of the Court and called on the executor to realise the furniture, &c., and pay the amount into the Guardians' Fund.

The Court, *on the application of the executor to have the will declared valid, declined to make such an order until the minors were represented by a curator; but authorised the husband to remain in possession of such of the furniture as was not required to pay the debts of the estate.*

Davies, Elizabeth A., late Estate ... 496

4. ——Inheritance, *see* Will.

Misjoinder, *see* Appeal.

Misrepresentation, *see* Damages.

Mistake, *see* Appeal.

2. ——*see* Judgment.

3. ——As to person with whom contracting, *see* Sale.

Mortgage, *see* Insolvency.

2. ——*see* Joint will.

3. ——*see* Minor children.

Mortgaged property sale, *see* Transfer.

Motion, *see* Provisional sentence.

Mutual will—Purchase by heirs—Absent major heir—Consent of minor heirs—Interest of executor dative.

Where a mutual will provided that any heir might take over the landed property and pay out the other heirs the Master refused to allow such a purchase by A., *one of the heirs, to go through without an order of Court, on the ground that the whereabouts of one of the majors was unknown and that the consent on behalf of the minors was given by the executor dative, who happened to be the husband of* A.

During, C. F., *in re* Estate of ... 86

Municipal Council—Election—Nomination—Act 45 of 1882, section 49—

PAGE

Public notice—Mayor—Town Clerk—Gross irregularity—Ratification—Costs.

Vacancies having occurred in the Municipal Council of C., proceedings were taken under Act 45 of 1882 to fill up the vacancies.

The Town Clerk called for nominations by notice published once in a newspaper having a local circulation, though apparently a smaller one than that of other newspapers also locally circulating. The publication in this newspaper was alleged to have been made in pursuance of a recent resolution of the Council to publish all its future notices therein. The notice was not posted up at the Municipal Office.

The Chairman of the Municipality first became aware of the notice (though signed by the Municipal Clerk "by order") in consequence of a telegram from the Municipal Clerk on the nomination day asking him to preside, which he did without protest, and he received the nominations made and declared the names of the candidates for election on the day of polling.

P. *and others claimed that the election should be stayed till fresh nominations could be sent in on the ground of gross irregularity in that the Chairman of the Municipality had not authorised the issue of the notice nor was it properly published.*

Held *that though the proceedings were irregular they were not so grossly irregular as to justify the Court in setting aside the nominations.*

Pearce v. Claremont Municipality and Others 251

Municipality — Cape Town Council — Casual vacancy—Election of Councillors—Notice—Ratepayer—*Locus standi.*

The Town Clerk, Cape Town, gave notice on the 18th Aug. that on the

PAGE

14th Sept. an election of Councillors to fill six vacancies would be held; nominations to be sent in by Aug. 31.

On Aug. 29 a casual vacancy occurred by resignation of a Councillor.

No steps were taken to call for nominations for the extra vacancy; but on the 1st Sept. (the day after nominations had closed) a notice was issued by the Town Clerk that nine nominations had been sent in and that seven Councillors would have to be elected at the elections on the 14th Sept., thus giving the first official notice of the seventh vacancy.

The Court *granted an interdict to forbid the election of more than six members, owing to the insufficiency of notice in regard to nominations to fill the seventh vacancy.*

Clark v. Cape Town Town Council 365

Name, *see* Trade mark.

2. ——and credit, *see* Partnership.

3. ——change of, *see* Transfer Deed.

Native location, *see* Title to land.

Negligence, *see* Bill of lading.

2. ——*see* Conveyance.

3. ——*see* Injury.

4. ——*see* Provisional.

5. ——*see* Trespass.

6. ——*see* Voluntary escape.

Nolle prosequi, *see* Malicious prosecution.

Nomination, *see* Municipal Council.

2. ——Councillors, Municipality, *see* Act 45 of 1882.

Nonjoinder, *see* Pleading.

Notarial Bond, *see* Grosse.

2. ——Separation made Rule of Court, *see* Judicial separation.

Notice, *see* Appeal.

2. ——*see* Municipality.

Novation, *see* Bailment.

2. ——*see* Provisional sentence.

Office (public), *see* Women.

PAGE

Onus, *see* Insolvency.

2. ——of initiation *see* Provisional sentence.

3. ——Probandi, *see* Conveyance.

4. ——*see* Insolvency.

Ordinance 104 of 1833, section 19, *see* Intestacy.

2. ——6 of 1843, sections 3, 27, 28, 71, 83, 84, 86, and 130, *see* Insolvency.

3. —— ——section 4, *see* Appeal.

Ordinary course of business, *see* Insolvency.

Ostriches on Crown land, killing of, *see* Resident Magistrate's Jurisdiction.

Other relief, *see* Partnership.

Overcarriage, *see* Bill of lading.

Parent—Minor—Trust property—Purchase by trustee.

C. *and* W. *jointly bought landed property for their minor children and the land was transferred to themselves in trust for the children. Subsequently* C. *bought from* W. *the half held in trust for* W.'s *child and obtained transfer of this also in trust for his own son.*

On application by C. *to be allowed to purchase the property at the value fixed by a sworn appraiser,*

The Court *authorised the purchase by* C., *the purchase price to be paid into the Guardians' Fund for the benefit of the minor.*

Cowling (minors), *in re* 387

Particeps criminis, *see* Game offence.

Particular account, *see* Insurance.

Partnership—Accounts.

Simms v. De Smidt 461

2. ——Assets and debts — Name and credit—Personal use—Dissolution —Receiver—Interdict—Rule *nisi*—Other relief.

S. *and* M. *were partners. The firm was dissolved on* S. *leaving the Colony and a new firm was made, in which* S. *was sleeping partner, and* M. *the working partner.*

PAGE

S. *subsequently gave notice of motion for an order to restrain* M. *from using the assets and credit of the new firm for his own personal purposes, as he clearly had been doing according to an account framed by himself.* M. *thereupon endeavoured to collect certain debts of the old firm not yet matured or owing.*

The Court granted a rule nisi, *to operate as an interdict, against* M.'s *collecting the debts of the old firm, and on the return day (the day of hearing the original motion) made the rule absolute, and under the prayer for "other relief" contained in the original motion granted a rule* nisi *calling on respondent to show cause why the partnership be not dissolved and a receiver appointed.*

This rule was also subsequently made absolute.

Shaw v. Moorhead 404

3. ——*see* Executors.

Party to suit—Evidence — Magistrate's discretion—Act 4 of 1861, section 8.

In an action in a Magistrate's Court for the price of goods sold and delivered the defendant admitted the debt in court. The plaintiff accordingly gave no evidence but, as he had come from his farm to the Court for the purpose of giving his evidence in case the defendant should deny his debt, the Magistrate allowed his expenses as a witness under the 8th section of Act No 4 of 1861.

Held, *on appeal, that there was no ground for interfering with the Magistrate's discretion.*

Geldenhuys v. Kuilder 394

Penalty clause, *see* Will.

Pending causes, *see* British.

Per Capita, *see* Will.

Peregrinus, *see* Appeal.

2. ——*see* Plaintiff.

Perennial stream, *see* Trespass.

Periodical Court, *see* Magistrate's Court.

PAGE

Permanent residence, *see* Plaintiff.

Permission to trade, *see* Insolvency.

Permitting drunkenness, *see* Liquor licence.

Personal use, *see* Partnership.

Per Stirpes, *see* Will.

Physical infirmities, *see* Executor testamentary.

Plagium, *see* Abduction.

Plaintiff—*Incola—Peregrinus*—Domicile — Permanent residence — Costs—Security — Resident Magistrate's jurisdiction—Procedure.

G. *sued* B. *before the Resident Magistrate, in an action for slander.* B. *applied that* G. *be ordered to give security for costs on the ground that* B. *was not an* incola *but a* peregrinus *intending to leave the Colony.*

The Resident Magistrate found that G. *did so intend to leave and ordered security to be given.*

Held on appeal *that the Resident Magistrate was justified under the circumstances of the case in making the order.*

Gordon v. Berliner 325

Pleadings—Exception — Insufficient plea —Nullity of defence.

Where A. *in his declaration claimed from* B. *the sum of £500 as the purchase price of certain landed property and* B. *in his plea set up a two-fold defence that* A. *had failed to tender to him the necessary documents to pass transfer, and that* A. *had mortgaged the land,*

The Court, *after argument on exception by* A. *that the plea raised no sufficient defence in law, allowed the exception with costs.*

Du Toit v. Van der Spuy 63

2. ——Nonjoinder—Trespass.

The owner of certain land gave certain grazing rights thereon to N.

In an action brought in the Magistrate's Court by the owner against the defendant, who had trespassed on the

PAGE

land, exception was taken that N. *ought to have been joined as co-plaintiff with the owner.*
Held, *reversing the Magistrate's judgment, that the interests of the plaintiff and* N. *were sufficiently diverse to entitle the plaintiff to sue alone.*
Du Toit v. Beukes 399

3. ——Time for Amendment—McLeod v. Cape Nitrate Syndicate 98

Pledge—Delivery—Possession—Attachment in execution—Interpleader.
The pledgee of a cart and horses obtained delivery of the same but afterwards allowed the pledgor to obtain possession of the same for the purpose of carrying on his (the pledgor's) *business as post contractor. The cart and horses having been attached at the suit of an execution creditor*, held, *that the pledgee was not entitled to claim them as against such creditor.*
Heydenrych v. Fourie 400

2. ——Promise to, *see* Spoliation.

Possession, *see* Derelict lands.

2. ——*see* Pledge.

Post-nuptial contract—Marriage in community.
A. *and* B. *were married in Germany without drawing up an ante-nuptial contract.* A., *the husband, was born in England but settled in the Cape Colony;* B., *the wife, was born in the Colony but resided in Germany. On returning to the Colony after the marriage it was discovered that a sum of* £1,000 *with interest* (*of which* A. *and* B. *were previously unaware*) *had become due to* B.
An order of Court was asked for authorising the parties to effect a post-nuptial contract having the force of an ante-nuptial.
The Court *refused to grant the order.*
Levi, Edmund H., and Wife ... 227

Postponement of trial, *see* Magistrate's Court.

PAGE

Power of Attorney, *see* Transfer.

Powers of Court, *see* Trust property.

Practice, *see* Appeal.

2. ——*see* Attachment.

3. ——*see* Attorney.

4. ——*see* Donation.

5. —— *see* Magistrate's Court.

6. —— *see* Provisional sentence.

7. ——*see* Transfer.

Precarious occupation, *see* Trespass.

Preference, *see* Insolvency.

Premises, *see* Liquor licence.

Prescription, *see* Grant.

2. ——*see* Promissory Note.

3. ——*see* Servitude.

4. ——Town Council—Public square—Stoep.
The owners of a house in Cape Town occupied and let the rooms in a structure adjoining the house but encroaching on a public square.
Held, *that the fact of the roof of the structure having been used by the owners as a stoep did not prevent prescription from running as against the Town Council, which had control over the square, and could with the consent of the Governor alienate it.*
Held further, *that a right thus acquired by prescription affords a cause of action as well as a ground of defence.*
Jones v. Town Council of Cape Town 73

5. ——*see* Trespass.

6. ——*see* Water.

Price, *see* Purchase.

Principal and agent, *see* Liquor Licensing Act, 1883.

2. ——Undisclosed, *see* Provisional sentence.

3. ——Case, *see* Provisional sentence.

Private Railway Act, *see* Interdict.

Privilege, *see* Slander.

Privileged will, *see* Will.

PAGE

Privity of contract, *see* Master and servant.

Procedure, *see* Appeal.

2. ——*see* Extradition.

3. ——*see* Malay Mosque.

4. ——*see* Plaintiff.

5. ——Purging default — Bar of plea —Rule 319.

Van der Merwe v. Theron... ... 260

6. ——*see* Resident Magistrate's jurisdiction.

7. ——*see* Transfer Duty.

Proclamation 134 of 1896, *see* Act 27 of 1893.

2. ——154 of 1896, *see* Animals' diseases.

3. ——431 of 1893, *see* Scab Acts.

Professional misconduct, *see* Attorney.

Prohibition of alienation, *see* Donation.

Promissory note — General bond — Security—Prescription.

Where a general bond has been passed to secure the amount of a promissory note on condition that the bond should become null and void on payment of such amount, the fact that such promissory note as such has become prescribed is not equivalent to payment and therefore does not render the bond null and void.

At the time when the bond was passed the insolvent was domiciled in Griqualand West and the bond was there registered in terms of section 29 of Act 4 of 1874, but he afterwards became domiciled in the colony proper where his estate was sequestrated as insolvent.

Held, *that the bond was entitled to the benefit of the proviso of the 10th section of the Prescription Amendment Act, 1861, and that, although more than eight years had elapsed since its passing, the creditor was entitled to prove his debt against the insolvent estate.*

PAGE

Held further, *that preference in respect of such bond extended only to assets in Griqualand West.*

Peach & Co. v. Simon's Trustee ... 18

2. ——*see* Provisional sentence.

Proof of debt, *see* Insolvency.

Prosecute, refusal to, *see* Malicious prosecution.

Prosecution, termination of, *see* Malicious prosecution.

Proper occasion. *see* Slander.

Protocol, extension of, *see* Ship.

Provisional sentence — Acknowledgment of debt—Liquid document—Balance of account—Costs.

Where provisional sentence was prayed on a document in terms of which periodical instalments had been paid, the dates and total amount of which were not given, so that the balance due could not be readily ascertained, though there clearly was an overcharge by plaintiff,

The Court held *that though the document was a liquid document, the matter was, under the circumstances of the case, one of account between the parties and refused provisional sentence, ordering costs to be costs in the cause.*

Heinemann v. Barnes 106

2. ——Bill of Exchange—Failure of consideration — Negligence of acceptor—Costs.

Where the acceptor of a bill of exchange took no steps to repudiate the goods which were to be the consideration of the bill but which were not according to order, and did not inform the plaintiff of his intention on account of such failure of consideration to dishonour the bill on presentation for payment,

Provisional sentence *was given with costs, there having been no tender by defendant on the due date of the bill*

PAGE

of such portion of the amount of the bill as he admitted in the action to be due.

Henry & Co. v. Clarke & Co. 72

3. —— —— Liquid document—Consideration—Breach of warranty.

A bill of exchange contained the words "value received in merchandise according to advice."

It was alleged that on arrival the goods proved not to be suitable nor in accordance with what had been warranted by the local agent of the consignor who had procured the order for the goods and who knew the purpose for which they were required; and that great loss had been occasioned to the defendant in consequence.

Held, *that the document was of a sufficiently liquid nature to entitle the plaintiff to provisional sentence, leaving it to the defendant to file his plea in the principal case, and to claim in reconvention for damages for any breach of warranty.*

Dronet v. Clark 12

4. —— ——Consideration – Promissory notes—Signing while intoxicated—Criminal charge—Principal case—Onus of initiation — Lease - - Registration.

J. *sued* C. *and* P., *on sundry promissory notes.*

The defendants alleged in their affidavits that there was no consideration for some at least of the notes; and though the signatures were not denied it was alleged that plaintiff was in the habit of giving strong drink to the defendants and obtaining signatures to documents from them while in a state of intoxication.

P., *however, had practically admitted the indebtedness in certain letters that passed between his legal adviser and plaintiff, and had allowed provisional sentence in favour of* J. *to go by default in regard to four previous*

PAGE

promissory notes for £282 in all, though he now denied that including these notes and the notes now sued on he owed more than a total of £100 on all his transactions with plaintiff.

The Court *gave provisional sentence as against* P., *but refused it against* C. (Solomon, J., *diss.*) *on the ground that serious criminal charges were made in his affidavit by* C. *against plaintiff, on which witnesses should be heard, and ordered the plaintiff to go into the principal case.*

J. *also applied on motion for an interdict restraining the mortgaging of certain land by* C. *until a lease alleged to exist had been registered against it.*

The Court *declined to grant the interdict, but ordered this to be gone into in an action to be consolidated with the principal case on the promissory notes.*

Joseph v. Calitz 297

Joseph v. Potgieter 297

5. ——*see* District Registrar

6. ——*see* Grosse.

2. — - ——Liquid document — Extrinsic evidence—Ambiguity.

Where a promissory note contained an undertaking to pay certain money "on account of property at X.."

Held, *on suit by a third party (a* bona fide *holder for value), that provisional sentence should be granted, as the words should* prima facie *be taken to be inserted not as a condition, but simply as a statement of the transaction which gave rise to the bill, and there was no sufficient proof that the holder or the original payee understood that the words imported any condition.*

Shaw v. Adamson and Another ... 105

8. — — —— Novation — Collateral security.

A., *being unable to meet a promissory note on maturity, gave* B. *a cession of a lease of land of which* A. *was the lessor.*

PAGE

B. *received the rents of the farm till the land was sold under a writ of attachment, whereupon* B. *sued* A. *on the promissory note.*

A. *alleged that the cession of the lease was intended to and did effect a novation of the promissory note.*

The Court held *that in view of the terms of the cession there was no such extinction of the original debt as would effect a novation by the substitution of a new contract, and granted provisional sentence.*

Dreyer v. Botha 120

9. —— —— Erased endorsement — Legal holder—Interdict—Lessor—Ejectment—Motion—Practice.

O. *sued* P. *for provisional sentence on a promissory note made in favour of* O., *which had been endorsed by him in favour of a bank, but which had come into* O.'s *hands again thereafter.*

A formal endorsement in favour of O. *by the bank was made after service of summons though the endorsement in favour of the bank had been erased.*

P. *applied for an interdict against* O. *to prevent his trespassing on land belonging to* O., *but which* P. *claimed to hold on a lease, asserted by* O. *to have expired.*

O. *thereupon also applied on motion for a decree of ejectment against* P., *on the ground that any right* P. *may have had to occupy had expired.*

The Court :

(1) Granted *provisional sentence on the note on the ground that* O. *was the legal holder and could sue without the additional endorsement by the bank.*

(2) Refused *to grant the interdict, as applicant had not made out a clear right.*

(3) Refused *to grant the decree of ejectment, it not being practice of the Court to grant such an order on motion.*

Olivier v. Potgieter and Another; Potgieter v. Olivier 312

Public notice, *see* Municipal Council.

2. ——Office, *see* Translator.

3. ——Roads — Railways — Materials — Sir John Cradock's Proclamation — Water Registration—Servitude — Quitrent land.

The Government has no right, under Sir John Cradock's Proclamation, to the water in a well sunk by the Railway Department in quitrent land for the supply of their engines as being a material for making and repairing public roads.

Permission granted by the owner of quitrent land to the Government to obtain water from any part of such land is not binding upon subsequent owners unless duly registered as a servitude upon such land.

Bower v. Colonial Government ... 163

4. ——Square, *see* Prescription.

Purchase and sale—Arrha—Earnest—Damages—Resale—Refund.

An agreement for the sale of furniture contained the stipulations that the furniture should be delivered to the purchasers but remain the property of the seller, and that moneys paid on account should count as hire of the furniture. At the time of the agreement the purchasers paid £10 on account but they did not obtain possession of the furniture. The plaintiffs refused to pay the price, whereupon the defendant resold the furniture for a sum less by £4 than the price agreed upon.

Held, *that the measure of damages to which the seller was entitled was the difference between the price agreed upon and the amount realised on the re-sale.*

Held further, *that if the £10 had been paid by way of* arrha *or earnest*

PAGE

money without any further stipulation the purchasers would not have been entitled to a refund of the money, but that, as it was expressly stipulated that moneys paid on account should count as rent and as the purchasers never had possession of the furniture, they were entitled to a refund.

Judgment was accordingly entered for the purchasers for the £10, less the amount of the damages sustained by the seller.

Brest and Ladon v. Heydenrych ... 54

2. —— Completion of Contract — Determination of price by third party—Witness expenses of successful party.

Where it was alleged that G. had agreed to sell to B. a half-share in his interest in a gold-mining syndicate on B.'s undertaking to pay up any calls that might fall due, but that G. had failed to carry out the terms of the contract,

Held, *that the contract not having been put into writing and there being no other clear evidence that the parties definitely understood that a contract of sale had been entered into, plaintiff was not entitled to recover damages claimed for breach of contract.*

Though G. had succeeded in the action the Court disallowed his witness expenses to mark disapproval of a want of candour in giving his evidence.

Blacking and Izdebski v. Gasson ... 35

3. —— —— Conditions—Price—Instalments.

Certain goods were sold for £22 on two conditions, viz., that the goods should remain the seller's property until paid for in full, and that at least £1 should be paid in every month. After £17 had been duly paid in monthly instalments but before the expiration of twenty-two months the seller sued the purchaser for the full price.

PAGE

Held, on appeal, *that the purchaser was entitled to the benefit of the second condition and that, having paid the monthly instalments as they fell due, he could not before the expiration of the full period be sued for the price in full.*

Schroder v. Heyns 54

Purchase of shop goods by insolvent, *see* Insolvency.

Purchase by trustee, *see* Parent.

Purging default, *see* Procedure.

Quarantine, *see* Scab Acts.

Quitrent land, *see* Public Roads.

Railway Company, *see* Interdict.

Railways, *see* Public roads.

Ratepayer, *see* Municipality.

Rates, *see* Divisional Council.

Ratification, *see* Municipal Council.

Reasonable and probable cause, *see* Malicious arrest.

Reasonable and proper cause, *see* False imprisonment.

2. —— ——*see* Malicious prosecution.

3. —— ——*see* Slander.

Receipt, *see* Divisional Council.

Receiver, *see* Partnership.

Recrimination, *see* Divorce.

Refund, *see* Purchase.

Refusal to prosecute, *see* Malicious prosecution.

Registered owner — Sale of land in absence of, *see* Transfer.

Registration — Company — Supplementary deed of settlement — Act 23 of 1861, section 7.

The K. Co., *by virtue of a clause in the original deed of settlement, agreed on the 11th March, 1896, to continue to carry on business for a further period of 10 years.*

On the 23rd June, 1896, a supplementary deed of settlement embodying the resolution was, on or before the 30th June, tendered for registration under Act 23 of 1861. The Registrar

PAGE

declined to accept it, holding that section 7 of Act 23 of 1861, in requiring such deeds to be tendered for registration within one month, had not been complied with, and that the registration should have been effected within a month from the date of the resolution.

The Court *ordered the Registrar to accept and register the deed.*

Kaffrarian Steam Milling Co. v. Registrar of Deeds 274

2. ——*see* Donation.

3. ——*see* Provisional sentence.

4. ——*see* Public roads.

5. ——*see* Trade mark.

Rei vindicatio, *see* Joint will.

Religious purposes--Sale of land held for, *see* Trust.

Remittal under Act 43 of 1885, *see* Trial by jury.

2. — of case, *see* Criminal appeal.

Removal of trial—balance of convenience.

Glass v. Graham's Town Brick-making Co. 174

Remuneration, *see* Delivery.

Rent, *see* Lessor.

2. ——Action for, *see* Jurisdiction.

3. ——Paid in advance, *see* Insolvency.

Requests, *see* Master and servant.

Re-sale, *see* Purchase.

Reservation of liberty to overcarry, *see* Bill of lading.

Reservatory clause, *see* Will.

Residence in Colony, *see* Appeal.

2. ——of defendant, *see* Jurisdiction.

Resident Magistrate, *see* Jurisdiction.

2. ——Costs — Judicial discretion.

M., *a doctor, sued on a summons on an account for £19 sent to an executor testamentary for attendance on the testator, the items of which were not specified.*

When action was brought the case was postponed to allow M. *to submit a specified account, which he did, but this account was erroneous, and had to be amended. The Resident Magistrate gave judgment for the correct amount (£12 10s.) but ordered plaintiff to pay costs by reason of the faulty summons and account.*

Held on appeal, *that the Resident Magistrate's discretion as to costs being a judicial one, and it having been judicially exercised, the judgment should not be altered.*

Molony v. Conradie... 205

3. ——Jurisdiction — Counter-claim — Rights in future — Unliquidated damage.

A. *sued* B. *for £20, balance of account for goods sold and rent.*

B. *excepted to the jurisdiction on the ground that he had abandoned the premises for which rent was claimed on account of breach of contract by plaintiff, and that on account of such breach* B. *was entitled to £50 damages.*

The Resident Magistrate, without taking evidence on oath, sustained the exception and gave judgment of absolution from the instance, on the ground that the counter-claim was beyond his jurisdiction and that rights in future were involved.

Held, on appeal, *that the Resident Magistrate should have tried the claim.*

Barnard v. Barnard... 129

4. —— ——*see* Jurisdiction and Resident Magistrate's Court.

5. —— ——*see* Plaintiff.

6. —— ——Statutes not conferring special jurisdiction — Act 20 of 1856, section 42—Powers of sentence in criminal cases—Killing wild ostriches on Crown land—Act 33 of 1889, sections 3 and 4—Reduction of sentence—Procedure.

A. *was charged before the Resident Magistrate with contravening section*

PAGE

4 *of Act* 33 *of* 1889, *by killing wild ostriches on unoccupied Crown land without a licence.*

The Resident Magistrate convicted him and sentenced him under Act 33 *of* 1889, *section* 3, *to pay a fine of* £20, *or undergo three months' imprisonment, though this Act does not expressly give Resident Magistrates jurisdiction.*

Held on appeal, *that in virtue of section* 42 *of Act* 20 *of* 1856, *Resident Magistrates have jurisdiction to try even an offence created by a statute which does not expressly confer jurisdiction on such Resident Magistrates, provided that the offence is not punishable by death, transportation or banishment, the Magistrate's powers as to punishment however being limited to the powers conferred by that section.*

The Court *therefore confirmed the conviction, but reduced the fine to* £10, *leaving, however, the alternative period of imprisonment unaltered. On application on the next Court day, however. the Court proportionately reduced also the alternative sentence of imprisonment.*

Regina v. Van Zyl 127

7. —— ——Sentence, *see* Appeal.

Restitutio in integrum, *see* Sale.

Restraint on alienation, *see* Will.

Review, *see* Appeal.

Rights in future, *see* Resident Magistrate's Jurisdiction.

Rinderpest, *see* Animals' diseases.

Riparian owner, *see* Trespass.

Roads—Bad repair, *see* Appeal.

Roll, Removal from, *see* Attorney.

2. —— ——*see* Barrister.

Rule 190, *see* Appeal.

2. ——319—Judicial separation—Consent paper.

Pleadings were filed in an action for divorce on the ground of adultery, brought by the wife, to which defendant pleaded condonation, bringing a claim in reconvention for judicial separation.

The parties consented to judgment for judicial separation, division of the joint estate, &c.

The Court *gave judgment in terms of the consent paper.*

Smith v. Smith 381

2. ——319, *see* Procedure.

4. ——327, *see* District Registrar.

5 ——329, *see* Damages.

6. ——329D, *see* Entry of appearance.

Rule nisi, *see* Appeal.

2. ——*see* Derelict lands.

3. ——*see* Partnership.

Rural tenements, *see* Lease.

Sale — Application documents, *see* Derelict lands.

2. —— Auctioneer — Advertisement — Mistake as to person with whom contracting — False representation —Legal fraud — *Restitutio in integrum.*

B., *an auctioneer, advertised for sale the household furniture at a house "next to* M.'s," *and after enumerating some of the furniture concluded the advertisement with the words "also a piano by a good English maker." The piano was in fact one which* B. *was anxious to sell on commission for the English maker.* B. *alleged that he had the authority of* W., *the owner of the goods advertised, to sell the piano at* W.'s *furniture sale.* F. *alleged that knowing the goods to be* W.'s, *and that* W. *had very good furniture, he bought the piano, and that as soon as he discovered that the piano did not belong to* W. *at the time of the sale he repudiated the contract.*

Held that *the auctioneer had not in his advertisement made any fraudulent or false representation such as could in any way have*

PAGE

reasonably misled F., *and that the contract was a valid one.*

Forbes v. Behr 341

3. ——*see* Bailment.

4. ——*see* Doctors.

5. — Child (to), *see* Liquor.

6. ——Fidei-commissary property, *see* Will.

7. ——Interest under will, *see* Transfer.

8. ——Land sale — Cancellation, *see* Transfer duty.

9. ——Land held for religious purposes, *see* Trust.

10. ——Property bequeathed, *see* Will.

11. ——*see* Purchase and sale.

12. —— Syndicate shares—Cession of action.

S., *who was entitled to three shares in a Nitrate Syndicate, sold to* L. *a quarter of his interest therein and gave a written cession in favour of* L., *and also notified the Secretary to the Syndicate. Subsequently by* S.'s *authority the Secretary, on the issue of the share certificates, indorsed on share certificate No.* 13 (*one of the three Syndicate share certificates issued to* S.) *a note that it was issued subject to the cession of the one-fourth interest.*

After the sale to L., S. *sold to* G. *and others a large number of shares in the Company to be floated by the Syndicate, and considerably oversold his interest.*

On the application of G., *the liquidator of the Syndicate was interdicted from parting with cash and shares in the company floated due for distribution on share certificate No.* 13 *and then in his hands.*

On a subsequent application by L., *however, disclosing the above facts,*

The Court ordered *the interdict to be set aside, so far as concerned the cash and three-quarters of the shares, on the ground that at the date of cession to* L. *all that could be done to complete the cession was done, and that* L.'s *claim was therefore preferent to that of* G.

Lindley & Wood v. Gedye and Others 112

PAGE

13. —— Warranty — Material defect—*Actio redhibitoria.*

In order to entitle an inexpert purchaser, who has paid for and received the article sold, to recover the purchase-money by the actio redhibitoria *it is not necessary that there should have been an express warranty of its quality.*

Statements as to quality made by the seller to such purchaser before or at the time of the purchase are sufficient if a material defect which is not readily ascertainable be subsequently discovered.

Wiid v. Murison 484

Satisfaction of condition, *see* Will.

Scab Acts — Transkeian territories — Proclamation 431 of 1893 — Quarantine—Licence—Removal of sheep.

H., *a farmer in the Maclear district, removed certain infected sheep, without the Scab Inspector's permission, from one farm to another (both being in the Maclear district) after they had been quarantined on the first farm.*

The licence under which the sheep were quarantined did not contain the name of the farm where the sheep were to be kept.

Held on appeal, *from a conviction by the Resident Magistrate, that* H. *had committed no offence under the Scab Acts, as there was no such mention in the licence as the Act requires of a place where the sheep are to be kept, and from which they are not to be removed.*

R. v. Holder... 118

Second Insolvency, *see* Insolvency.

Security, *see* Plaintiff.

PAGE

2. ——*see* Promissory Note.

3. ——*see* Ship.

Self-protection, *see* Libel.

Sentence, reduction of, *see* Resident Magistrate's Jurisdiction.

Sentimental value, *see* Will.

Sequestration, contemplation of *see* Insolvency.

2. ——Subsequent, *see* Insolvency.

Servants, gross negligence, *see* Bill of Lading.

Servitude, *see* Public roads.

2. — Wood-cutting — Prescription — Criminal conviction—Summons.

The servitude of cutting wood on one person's land may be acquired by prescription by the owners of other land if they have for thirty years or upwards continuously cut wood thereon peacefully, openly, and as of right.

The 8th section of the Forest Act, 1888, *authorises the Commissioner to make rules to regulate the use of trees or forest produce by persons having a servitude of wood-cutting on Crown forest and imposes a pecuniary penalty for a contravention of any such rule.*

The appellant, being entitled to such a servitude, cut wood in a Crown forest in a manner prohibited by regulations framed under the Act, but was prosecuted for a contravention of the 16th section, which does not apply to persons entitled to such a servitude and which allows a much severer penalty than can be imposed for a contravention of the regulations.

Held that *the conviction must be quashed.*

Regina v. Schultz 211

Servitus aquæhaustus, *see* Illegal impounding.

Set-off, *see* Insolvency.

Sheep, removal, *see* Scab Acts.

Sheriff, *see* Attachment.

PAGE

Ship—Attachment—Damage to cargo —Jettison—Extension of protest —Security—Expenses—Costs.

Certain cases of acids were shipped on the T. under a bill of lading providing that "if any chemicals . . . are shipped without being previously arranged for" they could be jettisoned at owner's loss.

The master of the ship noted on the margin of the bill of lading "the master is not liable for the jettison of the twenty-six cases shipped on deck."

On the voyage the cases exploded and for the safety of the cargo were thrown overboard.

On arrival in port the master noted a protest, but refused to extend it unless it and the damage to cargo were paid for by the consignees.

An order for attachment of the ship ad fundandam jurisdictionem *was thereupon granted.*

On application by the master, however setting forth the facts,

The Court *discharged the order.*

"Tasmania," *in re* The Ship ... 390

Shipowner's liability, *see* Bill of lading.

Signing while intoxicated, *see* Provisional sentence.

Sir John Cradock's Proclamation, *see* Public roads.

Slander — Defamation — Privilege — *Bona-fide* communication — Proper occasion—Interest—Justification — Reasonable and probable cause.

B., *the reporter of a newspaper,* S., *called upon* J., *a Government official, at his office, not stating that he was a reporter, but asserting, as it was alleged, that he had come "officially" from the Government to inquire into certain matters connected with* J.'s *administration.*

On the following day a paragraph admittedly incorrect and libellous appeared in S. J., *who did not at first know of* B.'s *connection with* S.,

PAGE

called at the office of S. to complain about the paragraph and stated that "a drunken and excited person" had called upon him the day before. Afterwards J. wrote to the proprietors of S. calling the visitor in question a "drunken impostor." Subsequently it was discovered that B. was the reporter complained of, but J., though he wished the proprietors of S. not to deal harshly with B., refused to withdraw the charges of drunkenness and insolence made by him, and B. was therefore discharged from his employment on S.

In an action for libel brought by B. against J., the Magistrate upheld J.'s plea of justification and privilege.

The Court held on appeal as to privilege that J. *was justified in making the communication he did, that the communication was a* bona-fide *one, made on a proper occasion by J., who had an interest, to the proprietors of S., whose interest it was to know the facts.*

Bulpin v. Jackson 263

Solicitor-General, *see* Malicious prosecution.

Specific performance, *see* Magistrate's Jurisdiction.

2. ——Reference, *see* Will.

Spoliation — Restoration — Promise to pledge—Forcible seizure.

It was alleged that a contract to pledge a wagon and donkeys had been made but no delivery had been effected, and that the respondents, who took possession of the wagon while standing in the highway, were entitled to retain possession, on the ground that as between the parties delivery by the pledgor is not essential to a contract of pledge.

The Court held, *that at most a mere promise to pledge had been given and that the respondents were not entitled to seize the articles to enforce the fulfilment of a promise.*

PAGE

It accordingly ordered the restoration of the articles on the maxim spoliatus ante omnia restituendus.

Council v. Factor & Lax 100

Spread of contagion, *see* Animals' diseases.

Squares, public, *see* Prescription.

Statutes, *see* Construction.

Stoep, *see* Prescription.

Strangers, *see* Will.

Sub-lease, *see* Lease.

2. ——*see* Lessor.

Substituted debtor, action against, *see* Bailment.

Substitution, *see* Will.

Successful party's witness expenses, *see* Purchase and Sale.

Summons, *see* Appeal.

2. — *see* District Registrar

3. ——*see* Magistrate's Court.

4. ——*see* Magistrate's jurisdiction.

5. ——*see* Servitude.

Sunday selling, *see* Liquor licence.

Supplementary deed of settlement, *see* Registration.

Surety bond—Illiquid summons—Maladministration—Executor dative—Evidence of loss sustained by the estate.

S. *and* P. *as sureties and joint principal debtors signed a surety bond for the sum of £180, binding themselves in that amount for the due administration of an estate by* T., *the executor dative.*

T. *failed to file an account and had left the Colony and gone to Johannesburg.*

The Master sued the sureties provisionally for the amount of the bond.

Held, *following* Wessels v. The Master of the High Court (9 Juta, 18) *and* The Master v. Werner and Others (4 Sheil, 418), *that the summons should have been in the same form as in illiquid cases and that*

PAGE

there should have been evidence before the Court as to the loss sustained by the estate.

The Master v. Talbot's Sureties ... 392

Suspectus fugæ, *see* Writ of Arrest.

Syndicate Shares, *see* Sale.

Tacit Hypothec, *see* Lessor.

2. ——*see* Divisional Council.

3. ——*see* Joint will.

Tacit relocation, *see* Lessor.

Tampering with jury, *see* Malicious prosecution.

Termination of prosecution, *see* Malicious prosecution

Testator's intention, *see* Will.

Theft — Bailee—Agent — Creditor and Debtor—Account.

The appellant had been employed by the S. Company as their salesman-collector under a written contract which provided that he should be bailee for the company of the books and other property but not of moneys collected, and contained other indications that he was to be an ordinary debtor in respect of such moneys and was to enter them in a debtor and creditor account. He entered the moneys received by him in such account but, on being called upon to pay the same to the company, was unable to do so and was accordingly indicted for theft.

Held, *on a question reserved after conviction, that the facts proved did not justify the conviction.*

Regina v. Golding 221

2. ——Conviction, *see* Circuit.

3. —— of Stock—Act 35 of 1893—Evidence sufficient to justify conviction.

Where the Magistrate convicted B., *who was charged with a contravention of Act 35 of 1893 by the theft of a goat, the chief evidence being that the goat's head and skin had been found about 200 yards from prisoner's hut, and that on persons coming to the hut to search it the prisoner's daughter was observed to throw some cooked goat's flesh out of the window,* Held on appeal *that the evidence was sufficient to justify the conviction.*

Regina v. Adams 59

Third person's property, legacy of, *see* Will.

Time limit, *see* Insurance.

Title, conditions in, *see* Trust property.

2. ——to land — Jurisdiction—Magistrate's Court Act—Native location.

A Magistrate's Court has jurisdiction in an action for trespass on Crown land in a native location, instituted by a native, who is in actual occupation under leave and licence from a Government official, against another native, who claims the right of occupation by virtue of prior user for a long period.

Mthusthea v. Mswelo 492

Town Clerk, *see* Municipal Council.

Town Council, *see* Prescription.

Trade mark—Designs—Registration — Interdict—Distinctive mark—Common use—Cigar labels.

S. *used certain designs as labels to distinguish his cigars. He applied to the Registrar of Deeds for their registration as his trade mark.* D. *objected to the registration on the ground that the marks or designs were in common use in the tobacconist trade.*

Affidavits were sworn to by K., *who deposed that he was the manufacturer of the designs in question, and was in the habit of selling them to anyone who would purchase them.* The Court *granted an order restraining the Registrar of Deeds from registering the designs as* S.'s *trade mark pending his bringing an action and establishing his exclusive right to the use of the designs.*

Dieterle v. Sturk 368

PAGE

2. ——Registration — Trade — Name— Interdict.

Where the registration of a trade mark is objected to before the Registrar of Deeds on the ground that it so nearly resembles a mark already in use, but not registered, as to be calculated to deceive, he should decide upon the application, leaving it to the person aggrieved to apply to the Court in terms of the 5th section of Act 22 of 1877.

Lewis v. Lazarus 429

Transfer — Consent of bondholder — Minor.

A., *a widow, held certain landed property subject to a reversion in favour of* B. *should* A. *re-marry.*

On the re-marriage of A. *transfer could not be passed to* B., *as the consent of the bondholder could not be obtained.*

The Court *authorised a sum of money to be raised sufficient to pay off the mortgage, and ordered transfer to be passed to* B., *assisted by her father, saving the rights of reversionary heirs.*

Van Niekerk, *in re* Minor 102

2. ——*see* Divisional Council.

3. ——*see* Donation.

4. ——*see* Executors.

5. —— Inheritance — Sale of interest under will — Landed property — Practice.

M. *died leaving a will, in terms of which her children and her husband were instituted sole and universal heirs of her estate, her husband however being entitled under the will to retain sole possession and administration and enjoy the usufruct of her estate till his death.*

The husband and children all sold their interests under the will to various persons.

The movables had been realised and only landed property remained in the estate; the purchasers applied for transfer to be passed to them direct instead of first to the heirs and then to the purchasers.

The Court *refused to allow any departure from the established practice.*

Hitzeroth, Maria, Estate 383

6. ——*see* Joint will.

7. —— Power-of-Attorney — Sale of mortgage land—Absence of registered owner—Practice.

D. *and* P., *who were the registered proprietors in undivided shares of erven at Cradock and shareholders in the Cradock Building Society, obtained a loan on security of the erven.*

As the mortgagors were in arrear in their payment to the society of the instalments due, the society notified to them that the erven would be sold to meet their indebtedness.

D. *thereupon gave the society a formal special power-of-attorney to sell and transfer the land, but* P. *merely wrote a letter stating that the society could sell the land and thereafter left the Colony without giving any such formal power.*

The Court, *under the special circumstances, granted an order upon motion authorising the Registrar of Deeds to pass transfer without having* P.'s *formal power and without further notice to* P.

Cradock Building Society 125

8. ——Deed—Change of transferee's name.

Where a person, whose real name was Powell, *but who had been brought up, confirmed, and married under the name of* Kuhn, *bought property, which was transferred to him under the name of* Powell, *the Court, at his request, authorised an amendment of the transfer deed by inserting the name* Kuhn *for* Powell.

Kuhn, *ex parte* 4

9. —— ——*see* Child-bearing age.

PAGE

10. ——Duty—Act 10 of 1896.

S. *purchased certain land in the Cape Division, the contract of sale being completed prior to the promulgation of the Transfer Duty Amendment Act, No. 10 of 1896.*

Subsequent to the promulgation S. *tendered payment of transfer duty, fine, &c., calculated upon the basis of the decreased rate (2 per cent.) payable under Act 10 of 1896; but the Civil Commissioner refused to accept this.*

Held that *as the sale was concluded prior to the promulgation of Act 10 of 1896, the duty payable must be reckoned as provided in Act 5 of 1884,* i.e., *at the former rate of 4 per cent.*

Sauer v. Civil Commissioner, Cape .. 258

11. ——— Act, *see* Will.

12. ——— —Exemption—Act 5 of 1884—Heirs—Descendants.

Where immovable property in the estate of a deceased person is proposed to be transferred to all his heirs, being his descendants, each heir is entitled to exemption from transfer duty, under the 2nd and 3rd subsections of the 19th section of Act 5 of 1884, *to the extent of his* ab intestato *share in the property so to be transferred to all.*

Van Wyk v. Registrar of Deeds ... 110

13. ——— ——— ———*see* Will.

14. ——————Sale of land Cancellation—Act 5 of 1884, section 18—Procedure.

A. *sold land to* B. *for* £300, *receiving* £200 *on account. Transfer was never passed and* B. *left the Colony and could not be traced.*

The Court, *on the application of* A., *granted a rule* nisi *calling on all persons to show cause why the sale should not be cancelled on* A.'s *depositing with the Master the sum of* £200 *so paid on account, less any costs the Court might order to be deducted.*

Stevens, H., petition of 150

Transhipment, damage after, *see* Bill of lading.

Transit, injury in, *see* Conveyance.

Transkeian Territories, *see* Scab Acts.

Translator—Women—Public office.

A woman is admissible as translator of the Supreme Court.

Flather, *ex parte* 495

Van Pelt, *ex parte* 495

Trespass—Damage by cattle—Liability—Negligence—Vindictive damages.

Cattle belonging to D. *trespassed upon* A.'s *land owing to* D.'s *carelessness, and considerably damaged a hay stack.*

Held that *as the damage was due to mere carelessness on* D.'s *part and not to any vindictive act* A. *was not entitled to vindictive damages.*

Adonis v. Du Toit 187

2. — Diagram — Grant — Water rights—Perennial stream—Riparian owner—Unreasonable use—Irrigation—Diversion.

A grant of land to L. *assigned the boundary of land granted to* H. *as* L.'s *boundary. The end of this boundary was alleged by* H. *to be a beacon marked* C, *but* L. *alleged that this fell within his ground, and that the true beacon was* B., *asserted by* H. *to be inside his boundary.*

In an action for damages for removal of fences and for trespass brought by H,

The Court held *that the defendant's diagrams indicated* C. *as the end beacon, and though it was contended that the defendant's grant overruled the diagram, the Court found that when the land was granted to* L. *by the Government the surveyor took*

PAGE

C. *as the true beacon and that defendant was not entitled to the boundary claimed.*
Hugo v. Lotter 267

3. ——*see* Illegal impounding.
4. ——*see* Injury.
5. ——*see* Interdict.
6. ——*see* Pleading.
7. ——Prescription—Precarious occupation.
T. was entitled to certain rights over the farm M. in terms of the will of his parents. One of the boundaries of the farm was the Oliphant's River. T. proceeded to cultivate a portion of land beyond the present west bank of the river, alleging that the river had changed its course.
The Court *found that the river had not so changed its course and that T. had acquired no title by prescription to land across the river, as he had held the same only on a precarious tenure, with the permission of the owners who were relatives.*
Maskew's Executors v. Truter's Executors 285

Trial by jury—Remit under Act 43 of 1885—Competency of Magistrate to try case—Acting Chief of Police.
Where a case has been remitted to a Magistrate for trial under Act 43 of 1885, the accused cannot demand to be tried by a jury.
The mere fact that the Magistrate, who presided at the preliminary examination and afterwards tried the prisoner, was Acting Chief of Police during a portion of the time occupied by the preliminary examination, but who took no part in the prosecution,
Held, *not sufficient to render such Magistrate incompetent to try the case.*
Regina v. Mohr 499

2. ——Postponement, *see* Magistrate's Court.

Trust, breach of, *see* Attorney.

PAGE

2. ——Funds, *see* Executors.
3. ——Land—Religious purposes—Sale.
The Court authorised the sale of certain land and buildings at Mowbray, which had been transferred to the Minister and Churchwardens for the time being of the Dutch Reformed Church, Wynberg, their assigns and successors in office, subject to the condition that the ground and erections should be used for religious purposes only, the property being useless to the Church, and the heirs of the donor raising no objection to the sale.
D.R. Church, Wynberg, *ex parte* ... 7
4. ——Property—Alienation—Trustee's benefit—Powers of Court—Conditions in title.
Transfer of land was passed in favour of Diocesan Trustees for the erection and maintenance of a House of Mercy or such other charitable purposes as the Diocesan Synod deem advisable should the House of Mercy be relinquished.
The land was bought and a large building for Refuge purposes was built on it with money raised by public subscriptions. A portion of the land had cottages upon it which required disproportionate expenditure, and money was required to clear off a debit balance remaining on the building.
With the consent of the principal subscribers application was made by the Trustees for leave to sell the portion of the ground with cottages on it, the proceeds to be devoted to the purposes of the Trust.
The Court *granted a rule* nisi *calling on any persons having objections to show cause why authority should not be given to the Registrar of Deeds to pass transfer to the purchasers of the property.*
Trustees Diocese Cape Town, petition 348

PAGE

5. —— ——*see* Parent.

Trustees of Ante-nuptial contract, release and substitution, *see* Ante-nuptial Contract.

2. —— Benefit, *see* Trust property.

3. ——Joint, *see* Damages.

4. ——Powers, *see* Insolvency.

5. —— Purchase by, *see* Parent.

Tutor dative, *see* Father.

Undue preference, *see* Bailment.

2. ——*see* Insolvency.

Undisclosed principal, *see* Liquor.

Unlawful detention, *see* Magistrate's Court.

Unliquidated damages, *see* Resident Magistrate's Jurisdiction.

2. —— ——*see* Insolvency.

Unreasonable use, *see* Tr spass.

Urban and Rural Tenements, *see* Lease.

Usufruct, *see* Minors.

Valuable consideration, *see* Insolvency.

Value of goods detained, *see* Magistrate's Court.

Verbal agreement, *see* Barter.

Vindictive damages, *see* Trespass.

Voluntary escape—Negligence.

On an indictment for "voluntary escape" the jury having found that the escape was allowed through the negligence, but not through the wilful act of the accused,

Held, *in answer to a question reserved, that the finding amounted to a verdict of not guilty.*

Queen v. McDonald 423

Waiver, *see* Insurance.

Warehouseman, *see* Delivery.

Warranty, breach of, *see* Provisional.

2. ——*see* Sale and purchase.

Water, following-up, *see* Illegal impounding.

2. ——Prescription—Interdict.

Interdict granted restraining R. *from divert ing or in any way interfering with water flowing from a spring on Crown land which* M. *alleged that he and his predecessors in title had exclusively used and enjoyed for a period of over thirty years.*

Milne v. Robinson 502

3. ——*see* Public roads.

Water-rights, *see* Trespass.

Wilful falsehood, *see* Malicious prosecution.

Will — Codicil — Reservatory clause—Specific reference — Holograph will —Privileged will—Division among all children—Witnesses.

V. *made a will containing the reservatory clause. Subsequently he added a codicil, in terms of which one of his children was to get a certain benefit "as co-heir."*

The codicil was in his own handwriting and referred to the will, but there was no actual mention of the reservatory clause and there were no witnesses. V. *had other children besides the one named in the codicil.*

The Court held that *as there was no special reference in the codicil to the reservatory clause and as the property was not divided by it among all the children, and therefore the document could not claim to be privileged, the codicil was invalid.*

Van de Wall v. Van de Wall's Executors 357

2. —— Construction — Election — Extrinsic Evidence.

A testator, married to his wife in community of property, treated the common estate as his own and bequeathed one-half thereof to his wife and the other half to his sisters. His wife died shortly after him and her heirs claimed, in addition to her half-share of the estate held in community, one-half of his share.

Held, *that if the heirs elect to hold the wife's share of community they cannot claim the benefit of the bequest.*

Held, further, *that in order to raise a case of election, it must appear on*

PAGE

the will itself, by plain demonstration or by necessary implication, that the testator disposed of that which was not his own.

McMunn v. Powell's Executors ... 65

3. —— —— *Fidei-commissum*—Issue—Illegitimate children.

By the law of this colony the general rule that "the mother makes no bastard," *so far as intestate succession to her property is concerned, applies also to the succession of illegitimate children to their maternal relatives.*

Where, however, a fidei-commissum *is imposed by a father's will upon the inheritance of his daughter in favour of her issue, only her legitimate issue are entitled to share as fidei-commissaries unless the will contains clear indications of an intention to the contrary.*

Russo, *in re* 207

4. —— —— —— Substitution — Restraint on alienation — Family — Strangers.

Where a testator imposes a restraint on the alienation of land bequeathed by his will and indicates the persons or classes of persons in whose favour the alienation is forbidden a clause in the will, stating that his reason or motive for imposing the restraint is to prevent the land from falling into the hands of strangers, cannot be construed as extending the restraint beyond the persons or classes of persons indicated by the will.

Where it is doubtful whether a substitution was intended to be direct or fidei-commissary the construction should be in favour of direct substitution.

Van Wyk's Trustee v. Van Wyk and Others 448

5. —— —— "Issue"—Children—*Per capita*—*Per stirpes.*

A testator by will bequeathed certain landed property to his daughter E. *and directed that on her death the property should devolve on her lawful issue, who should then be living, in equal shares and proportions.* E. *survived the testator and then died leaving her surviving five daughters, but the sixth daughter* F. *predeceased her, leaving children.*

Held (1) *That in the absence of clear indication to the contrary in the will, the term "issue" embraces all the descendants of* E.

(2) *That the children of* F. *are entitled to share in the bequest with* E.'s *surviving daughters, and*

(3) *That the children of* F. *should share with the children of* E. per stirpes *and not* per capita, *and are, therefore, only entitled to the share which would have devolved on* F. *in case she had survived* E.

Board v. Titterton 176

6. ——*see* Executors.

7. ——Election—Legacy of property of third person—Testator's intention—Penalty clause—Disinherison—Forfeiture.

In 1886 J. *and* M. *married in community executed a will under which the survivor was appointed sole and universal heir.* J. *survived and continued in possession and acted as sole heir till his death.*

In 1887 J. *married* U. *under an ante-nuptial contract settling certain erven and furniture upon* U.

In 1895 J. *made a will bequeathing money and immovables to the children of the first marriage and certain property to* U., *and provided should any of the children attempt to upset the will they should lose all right thereunder.*

After J.'s *death the children instituted an action, as a result of which the 1886 will was declared invalid, and the Court ordered* J.'s *executors to pay over to* M.'s *estate her half of the joint estate as it was at the time of her death.*

PAGE

The executors under the 1895 will claimed that those of the children who had caused the first will to be upset had forfeited all right under the 1895 will in view of the penalty clause; and prayed the Court for a declaration of rights, urging that the defendants must make election between taking a half share of the estate of J. *and* M. *as it stood at* M.'s *death (as her heirs* ab intestato*) or taking under* J.'s *will of 1895.*

The Court held *that* J. *by his subsequent will having revoked his share in the 1887 will, the effect of the judgment in the action on the earlier will was to declare that the mother had died intestate, this judgment did not affect* J.'s *subsequent will in any way; that the children who had brought the action were therefore not debarred under the penalty clause from claiming; and holding that all the beneficiaries of the will were not before it the Court declined to make any order as to the necessity for election.*

Cross Executors v. Cross and Others 349

8. ——Fidei-Commissum—Perpetuity—Presumption.

Testators by their mutual will bequeathed certain land to their children on the death of the surviving testator on condition that the children should never be allowed to alienate the land, "it being the testator's desire that the said land shall have to be and remain a patrimony (erfgoed) *for their children and further descendants under the same limitations as those under which their children shall assume the same."*

Held, *that a* fidei-commissum *was intended to be created, but that, in the absence of a manifest intention to the contrary expressed in the will, such*

PAGE

fidei-commissum *should be confined to four generations counting from the first fidei-commissary legatees, viz., the testator's grandchildren.*

Ryklief v. Ryklief's Executrix ... 88

9. —— —— Testator's intention — Satisfaction of condition—Death—Dissolution of marriage—Benefit of fiduciaries — Sale of fidei-commissary property.

D. *died, leaving a will under which* W. *was instituted sole heir, subject to a* fidei-commissum *in favour first of* W.'s *descendants, and second of the blood relations of the testatrix. The will further provided, however, that should* W. *survive her husband she should have the inheritance.*

Subsequently D. *obtained a divorce from her then husband; and applied to the Court for leave to deal absolutely with the estate, the marriage having been terminated by the divorce as much as it could have been by death, and the intention of the testatrix (to protect* W. *from her husband) having thus been fully met. Bondholders were threatening to obtain judgment and funds were required.*

The Court *authorised the sale of the* fidei-commissary *property, the money to be paid into the Guardians' Fund for the benefit of the trust.*

De Villiers, Eliz. M. C, Estate late 406

10. ——Minor inheritance — Benefit of minor—Sentimental value—Sale of property bequeathed.

A. *by his will bequeathed a large landed property at Rondebosch in the Cape Division to "my eldest son* G. *or my eldest son surviving at the time of my death."*

G. *succeeded to the property at the age of nine years. After great difficulty the estate was let at* £300 *per annum for a maximum period of five years. The estate however was liable for* £160 *per annum for taxes*

PAGE

and insurance, and large annual expenses were required for its maintenance.

An offer was made to the executors, to purchase the property for £17,500. The Master strongly recommended it, as being greatly to the minor's benefit that the property should be so sold. On application to the Court,

Held, *that as from the will the testator desired the estate to remain in the family, although it might be more to the minor's benefit to sell than to adhere to the sentimental value placed on the property by the testator, the provisions of the will must be carried out, the minor in this case being proved of ample means to keep up the property.*

In Estate of late G. P. Moodie ... 243

11. ——Power of appointment—*Fidei-commissum*—Transfer Duty Act—Exemption—Act 5 of 1884, section 19 sub-section 12.

Where a testator has conferred on a person to whom he has given a limited interest in property, the power of selecting the person on whom such property should devolve at the expiration of such limited interest, the due exercise of such power has the same effect as if the testator had himself made the selection in the will.

A testator by will directed that his daughter should have the income for life of certain funds, and that after her death such funds should devolve upon such child or such of her children in such shares and in such manner as she should by deed or will appoint. He further directed that certain land of his should be preserved in his family as long as possible and should be retained as part of the funds, with liberty, however, to the trustees of the funds

PAGE

to sell the land, if expedient, but only with the consent of his daughter. After his death she apportioned the funds among her daughters and allotted to her son A. the residue of the funds, which included the land which was still unsold. The executors of the testator being about to transfer the land to A.;

Held that *he was exempt from the payment of transfer duty as being a descendant within the fourth degree of the testator and claiming free property in remainder after the expiration of a previous* fidei-commissum, *or other similar limited interest, in terms of sub-section* 12, *section* 19 *of Act* 5 *of* 1884.

Myburgh v. Registrar Deeds ... 228

12. ——Vesting.

A. *and* B. *by their wills instituted* M. *as heir among others so that* M. *should have the interest of her share during her lifetime, and after her death the capital sum should go to her heirs.* M. *died. The Master, into whose hands in terms of the will the inheritance had been paid, declined to pay out her share to the executors of her estate, holding that it had never vested in* M. *and that as the will provided for the devolution of the property after* M.'s *death the money could be paid over to* A. *or* B.'s *executors only.*

The Court *ordered the Master to pay to* M.'s *executors.*

In Estate Maria Du Plessis ... 247

Withdrawal, *see* Appeal.

2. ——Attorney, *see* Entry of appearance.

Witness Expenses, *see* Appeal.

2. ——*see* Purchase and sale.

3. ——*see* Will.

Women, *see* Translator.

Woodcutting, *see* Servitude.

PAGE

Writ of arrest—Discharge—Insolvent —Suspectus Fugæ.

Where charges of fraudulent and culpable insolvency and of intention to abscond were made against an insolvent in an affidavit sworn to by a creditor, a judge in chambers ordered the insolvent to find bail in the sum of £250 to attend the meetings of his creditors, or failing bail to be arrested.

The insolvent being unable to find bail was arrested.

On the return day of the writ of arrest the insolvent appeared and denied on oath the allegations in the creditor's affidavit and as the creditor was not present to give evidence in support of his affidavit the writ of arrest was discharged.

Heydenrych v. Lynch 50

Wrong party, *see* Appeal.

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